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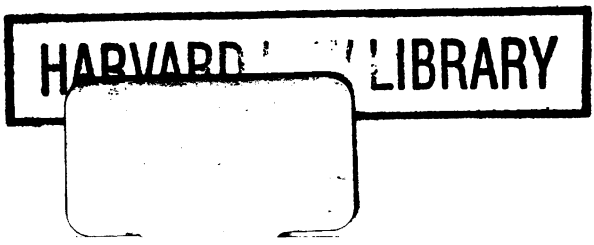
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REPORTS

OF

CASES

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ADJUDGED IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

BEING A COLLECTION OF NUMEROUS CASES DECIDED IN THE YEARS, COMMENCING IN OCTOBER, 1815, 1816, 1817, 1818, AND 1819; ALPHABETICALLY DIGESTED, UNDER PROPER HEADS.

BY WILLIAM BRAYTON,
A JUDGE OF SAID SUPREME COURT.

MIDDLEBURY:
PUBLISHED BY COPELAND AND ALLEN.
1821.

ERRATA.

Page 22, line 2, from bottom, for "Hickson," read *Hicks et al.*
24, In Assumpsit, No. 2, line 6, for "against," read *by.*
31, line 7, from bottom, for second "if," read *and.*
40, 1, from top, for "Everett," read *Hunt.*
40, 14, from bottom, for "found," read *favored.*
54, 12, from top, erase "as," and in line 15, for "in," read *on.*
55, 1, from top, for "would," read *could.*
56, 14, from bottom, for "M." read *V.*
60, 14, from bottom, for "selling," read *settling.*
61, 12, from top, for "person," read *prison.*
69, 2, from top, for "deceares," read *declares.*
92, 13, from top, for "specially," read *specialty.*
109, 18, from top, for "this," read *thus.*
110, last line, for "denied," read *derived.*
111, 7, from bottom, for "on," read *an*—11th line, erase "by."
120, 7, from top, for "plevies," read *pluries.*
122, 2, from bottom, for "complete," read *competent.*
135, 21, from bottom, for "claims," read *claiming.*
139, 13, from top, for "requested," read *required*—and transpose "plaintiffs" and "defendant."
147, 8, from bottom, after "is," insert *no.*
156, 2, from bottom, for "conversant," read *conusant.*
11, from bottom, for "Mod." read *Mad.*
157, 11, from top, transpose "it to."
158, 3, from top, for "palpable," read *probable.*
173, 10, from top, for "making," read *marking.*
188, 6, from top, for "on," read *or.*
200, 4, from bottom, for "was," read *were.*
205, last line, for "his," read *their.*
226, 16, from bottom, after "may," read *to.*
228, 3, from bottom, for "responible," read *responsible.*

PREFACE.

WHEN an *author*, or *compiler*, offers to the public, a volume, intended for either, *amusement* or *utility*, and apologizes for its imperfections, on account of *haste*, and *want of time*, to correct its errors, it may well be replied: "Why do you obtrude upon us, a half finished performance? We have no concern with your *means*, but, are interested, *only*, in the *work*, itself." Nevertheless, I hope to find, that the circumstances, under which this small volume is published, will be received, by an indulgent public, as, in some measure, excusing its many imperfections.

I submit the facts. Since the last Law Circuit, I first attempted to collect and arrange materials for Reports of Cases, adjudged in the Supreme Court of this State: Much anxiety had been manifested by individuals, that such a work should be accomplished, and I have ventured to *commence* the undertaking.

Finding it impracticable to Report the Cases adjudged, in the order of time, when they were determined, I concluded to adopt the manner of *Salkeld*, and Report as many Cases, as I could collect and arrange, under titles to which they severally apply. Where a Case contains principles, applicable to several titles, it is reported under some *one*, and reference made to it, under *every* title, to which it could have any application.

I have made use of the manuscript notes of the late Chief Justice SKINNER, containing a digest of the Cases, decided in the official years 1816 and 1817, and have reported, more at length, Cases decided since October, 1817, from the pleadings and cases, from the briefs of counsel, and my own minutes.

As the opinions of the several Judges, or of the Court, were not *written*, I could not attempt to furnish the reasons and arguments of *each Judge*, or of the *Court*, at length.

My principal object has been to furnish an exact *statement*

of the case, the *heads* of the arguments, and the *substance* of the opinion of the Court, *precisely* as the case was adjudged.

It will be noticed, that, in some instances, cases adjudged in our *sister States*, are cited; it is well known such decisions are not received as *authorities;* yet, they are of more weight than mere argument, on those subjects, concerning which, it is highly important an uniformity of practice should be established among the several States.

I had intended this volume should have contained a much greater collection of Cases, but owing to extra-ordinary business, in the North-Western Circuit, I have been obliged to devote four weeks extra, to the official business of that Circuit. This interruption has prevented my completing the work, in the manner I had proposed. It is, however, thought expedient, that the work be published, without farther labor or expence, so that it may be ascertained whether it will meet with approbation and encouragement.

Should *this* volume be approved, and the *expence paid*, the Vermont Reports will be continued, in the usual manner of reporting cases, in the order of time, and with such improvements as may be the result of practice and experience, so long as the subscriber shall have access to the materials for reporting correctly.

Gentlemen of the Bar, who may discover any inaccuracies, and will communicate them to me, will much oblige their, and the public's.

Humble Servant,

WILLIAM BRAYTON.

St. Albans, July 18, 1820.

JUDGES OF THE SUPREME COURT,

DURING THE YEARS EMBRACED IN THESE REPORTS.

DURING THE YEAR COMMENCING IN OCTOBER, 1815:

ASA ALDIS, Esquire, *Chief Judge.*

RICHARD SKINNER, and JAMES FISK, Esquires, *Assistant Judges.*

DURING THE YEAR COMMENCING IN OCTOBER, 1816:

RICHARD SKINNER, Esquire, *Chief Judge.*

JAMES FISK, and WILLIAM A. PALMER, Esquires, *Assistant Judges.*

DURING THE YEARS COMMENCING IN OCT. 1817, 1818, AND 1819:

DUDLY CHACE, Esquire, *Chief Judge.*

JOEL DOOLITTLE, and WILLIAM BRAYTON, Esquires, *Assistant Judges,*

NOTE. During the sessions, in Franklin and Chittenden Counties, subsequent to October, 1819, the Chief Justice was necessarily absent.

TABLE OF CASES.

RULES

OF THE

SUPREME COURT

AND

COURT OF CHANCERY.

FIRST.

ORDERED, That all actions, cognizable before this Court, shall be entered before the opening of the Court, on the first day of the session therof.

SECOND.

That all causes brought to this Court, by appeal, from any County Court, shall be heard, tried, and determined upon the pleadings in the Court below; unless the party wishing to change his plea, shall give notice to the adverse party, in writing, of the alteration, amendment, or new plea intended to be made, at the time of granting such appeal, or not less than thirty days before the session of the Court to which said appeal shall be taken.

THIRD.

That on the entry of every writ of error, the plaintiff in error shall deliver to the Court a fair copy of the writ of error, with the assignment of the errors. And whenever an issue of law is joined, the party demurring, shall furnish the Court with a fair copy of all the pleadings in the cause.

FOURTH.

That the orator, in every suit in Chancery, shall deliver to the Court, a fair copy of the bill, at the opening of the Court, on the second day of the term, and the defendant shall deliver

to the Court a fair copy of his answer, plea, or demurrer, at the time of filing the same.

FIFTH.

That all motions for the continuance of causes, shall be made on the first day of the sitting of the Court, founded on affidavit, in writing, of the person in whose favor the motion is made, or his attorney, which affidavit shall be lodged with the Clerk of our Court.

SIXTH.

That there shall be paid to the Clerk, for his use, on the filing each affidavit, fifty cents—whose duty it shall be carefully to endorse the true day when the same was filed in Court, and to keep the same on file.

SEVENTH.

That in all cases where an order has been made by the Court, or either of the Judges, for publication in any newspaper, it shall be the duty of the Clerk to inspect such publication, whose certificate that the same is made in pursuance of said order, shall be received by the Court as *prima facie* evidence that such order has been complied with, and the Clerk shall receive twenty-five cents as a fee for such inspection and certificate.

EIGHTH.

That whenever a party, plaintiff, shall enter a writ of error in this Court, he shall, on or before the second day of the term, file and lodge with the Clerk, a full record of the Judgment of the Court below, on which such writ of error was founded, properly certified by the Clerk of said lower Court; and the same shall be kept for the information of this Court, and the inspection of the parties.

NINTH.

That all bills in Chancery, hereafter to be brought, and all decrees for signature, shall be endorsed or signed by some so-

licitor of the Court, subscribed with his own hand at the foot of such bill, petition, or decree, and who shall be answerable for the propriety of the form, and language of the same, and the correctness of such decree.

TENTH.

That every case to be heard in this Court in error—on demurrer—in arrest of Judgment—on a case stated—case reserved—and on a motion for new trial—the counsel for each party shall, before the cause shall come on to be argued, make out and deliver to each of the Judges, a brief therein, fairly written; which shall contain the principal point or points intended to be relied on, and the heads of the intended argument, distinctly and concisely noted, and properly arranged under each head; the authorities to be produced in support, with fair and distinct references to the case, book, and page.

ELEVENTH.

That every case to be heard in Chancery, on demurrer, on plea, on bill and answer, and on traverse of the answer, the counsel for each party shall, before the same shall come on to be heard, make out and deliver to each Judge, a brief therein, fairly written, to contain the point or points of law, equity and fact, intended to be relied on, distinctly and concisely noted, and properly arranged; and under each, the authorities to be produced, with fair distinct references to the case, book and page, and as far as shall depend on confession or proof, with distinct and concise references to the concession, document and other proof in the cause.

TWELFTH.

That whenever any bill in Chancery, against a person resident without this State, shall be presented to a Judge of this Court, such Judge may make an order, either directing personal notice by a copy of such bill, and order thereon, to be left with the respondent by some suitable indifferent person

whose return shall be verified by oath; or directing a publication of the substance of such bill and order in some public newspaper, three weeks successively, the last of which publications shall not be less than four weeks before the session of the Court to which the respondent shall be cited to appear; either of which orders made and complied with, shall be sufficient notice for the respondent to make answer to such bill.

THIRTEENTH.

That in all causes originally entered in this Court, the defendant shall plead therein, by the opening of the Court on the second day of the term—to which plea the plaintiff shall reply by the opening of the Court on the third day of the term.

FOURTEENTH.

That whenever the guardians of any minor, idiot, lunatic, or distracted person, shall think it necessary to the support, or conducive to the interest of their ward, to sell and convey his real estate, and shall present his petition therefor to either Judge of the Supreme Court, such Judge may direct the substance of said petition, and his citation thereon, to be published in such public newspaper as he shall judge will most propably give notice to all concerned, of the premises, for such number of weeks as he shall think proper, the last of which publications shall be at least sixty days before the session of the Court to which such petition shall be addressed, which shall be deemed sufficient notice to appear, &c.

FIFTEENTH.

Admission of Attornies and Solicitors.

That hereafter, when any Attorney, who has been admitted to the County Court, and has practiced with reputation therein, for three years, shall apply for admission as an Attorney of this Court, which application shall be made at the law term of the Court in the County where such candidate resides; the Court on the recommendation of the Bar of such County, will

appoint a committee of the members of such Bar to examine into the character and qualifications of such candidate; and if such committee find the candidate qualified, they shall recommend him to the Court for admission.

SIXTEENTH.

And whenever the Attorney applying for admission as aforesaid, shall wish to be admitted as Solicitor in the Court of Chancery, it shall be the duty of the said committee, so appointed as aforesaid, to examine into the qualifications of the candidate, who shall be admitted by the Court on the recommendation of such committee, in writing.

SEVENTEENTH.

That when any Attorney of this Court shall apply for admission as Solicitor in the Court of Chancery, on the recommendation of the Bar of the County in which he resides, the Court shall appoint a committee of such Bar, to examine into the qualifications of such candidate, who shall be admitted on the recommendation of such committee, in writing.

EIGHTEENTH.

That no Attorney or Solicitor, of this Court, shall enter bail in any suit or process which is or shall be pending in the Supreme Court or Court of Chancery.

RUTLAND, ss. *Supreme Court, Jan. Term*, 1817.

IT IS ORDERED, That the foregoing be printed and published, as the rules of the Supreme Court of Judicature and Court of Chancery.

By the Court,

R. TEMPLE, *Clerk*.

CASES

ADJUDGED IN THE

SUPREME COURT OF VERMONT.

A.

ABATEMENT.

No. 1.

START *against* ROBINSON & RUBLEE. *Franklin*, 1819.

A Writ will not abate, because the plaintiff, not being a freeholder, is the only person recognized for costs.

PLEA in Abatement, that plaintiff was not a freeholder, at the time of praying out the writ, and was the only person recognized for costs.

Wetmore for defendant. The former decisions of this Court, that a plaintiff might be recognized alone, were founded on the 45th section of the Judiciary Act, relating to *attachments*, and do not apply to this case, where plaintiff was not a *freeholder;* which comes under the 44th section.

But by the Court. The two sections are similar; in both cases, security shall be given, to the satisfaction of the authority signing the process; such authority is the sole judge, *for the purpose of issuing the process*, of the security he takes, and whatever security he deems satisfactory must answer the law.

Judgment. Defendants answer over.

Note.—The writ in this case issued previous to the Statute of 1818 on this subject, Page 75.

No. 2.

DUNMORE MANUFACTURING CO. *against* **ROCKWELL.**
Addison, 1818.

PLEA of Abatement. That the constable who served the writ was a member of the corporation.

Judgment. That the writ abate.

No. 3.

DUNMORE MANUFACTURING CO *against* **MORTON.**
Addison, 1818.

A Corporation is not obliged to give security on praying out a writ.

PLEA in Abatement. That the Plaintiffs were not, at the time of suing out the writ, freeholders, and that the authority signing the writ, did not take *any* security by way of recognizance.

The Court decided, the Statute included *natural* persons *only*, and not artificial, as corporations.

Judgment. Plea insufficient.

No. 4.

COLLARD *against* **CRANE.** *Chittenden*, 1819.

Plea in Abatement, That the plaintiff was, at the commencement of the action, insane and under guardianship. Held sufficient.

It is not necessary, in such plea, to set forth the proceedings previous to the appointment of guardian.

After the opinion of the Court was delivered, the guardian was permitted to enter and prosecute the suit on terms.

THIS was an action, in common form, brought by John Collard against Arzah Crane, on note.

Plea in abatement. That, at the time of the commencement of this action, Collard was an insane person; and that Elnathan Keyes was his guardian, duly appointed by the Judge of Probate.

Adams for plaintiff contended. That the plea does not disclose facts sufficient to abate the writ; a mere appointment of

a guardian by the Judge of Probate is not sufficient; he cannot appoint a guardian, without previous proceedings; a commission must issue and regular proceedings be had to ascertain the *fact* of insanity: as the plea has not set forth these proceedings, it is deficient.

2. The writ is correct, even if it legally appears, that Collard was insane: The contract of a lunatic is not void but voidable. By the English practice the suit is brought in the name of the lunatic. 3 Bac.541. Our Statute gives the custody of the property to the guardian, but does not point out the mode of bringing suits. Contra. *Robinson.* 1. We must presume, the Judge of Probate acted on legal grounds, in appointing the guardian; so that, it is not necessary, to set forth the previous proceedings, in the plea. 2. By our Statute, a lunatic is considered, as dead in law; and no act can be done, affecting his property, but by his guardian.

By the Court. 1. The Court of Probate, having jurisdiction over the subject matter; the appointment of guardian, by that Court, must be considered, to be on regular previous proceedings. 2. In England, the affairs of a lunatic, are thrown into Chancery, hence, we have no precedents, of suits at law, by guardian. In this State, all the concerns of the lunatic, are placed exclusively under the control of his guardian; he is clothed with full powers to administer the estate, must give bonds, make an inventory, and be accountable, for all the property, of the person, to whom he is appointed guardian. I. Stat, 404. Every suit affecting such property must be brought in his name.

Judgment. That the writ abate.

A motion was then made, by the guardian, for leave, to enter and prosecute the suit: leave was granted, on payment of five dollars; and the judgment in abatement not entered. This motion, was not argued, and was made, and decided, at the moment, of adjournment without day. One judge only (Brayton) being present.

No. 5.

STATE *against* E. & L. STANHOPE. *Franklin*, 1816.

AN Indictment for larceny, will not abate, where the plea of *alien enemy*, does not alledge, particularly, the mode and manner, (i. e. the facts, by which the respondents, are subjects of the sovereign at war) nor, that the taking the goods, alledged to have been stolen, was an act of war, or that respondents did the act in character of an enemy.

No. 6.

EDMONDS ET AL. *against* MORRILL. *Franklin*, 1816.

A process for *forcible entry and detainer*, will not abate; because the plaintiffs, in describing their possession, state, they were possessed, as *executors*.

No. 7.

BROWN *against* HINMAN. *Bennington*, 1817.

A bond, to prosecute an appeal, from a decree of Probate, must be given, in the usual form, of executing bonds; and if taken, by way of recognizance, the process will abate; even after continuance.

NOTE.—In the case of Boyden Adm. of Brown against Phelps. Windham, 1818. The Court decided, after argument, to sustain an appeal, from the decree of Judge of Probate; although the bond to prosecute, was taken by way of recognizance.

No. 8.

LACY, ADMINISTRATOR *against* ROBERTS. *Bennington*, 1817.

IN case a plea of abatement is offered in the County Court, judgment thereon with a *respondeas ouster*, and trial had on the merits; whereupon, the cause is appealed, to the Supreme Court. The Court will hear the question in abatement.

No. 9.

MILLER *against* **HAYES ET AL.** *Windham*, 1817.

A writ will not abate, on the ground, that the service was made by the son in law, of the plaintiff, under a special direction, given him by the authority, issuing the writ; nor is it necessary, for the authority, to aver, the person authorized, to be indifferent.

No. 10.

BENSON *qui tam, against* **EGERTON.** *Windsor*, 1817.

A prosecution *qui tam* for usury, abates by death of defendant. If the defendant decease, after verdict, and before the law term, judgment being respited, by a motion in arrest; Court will not render judgment *nunc pro tunc*.

No. 11.

CAMPBELL ET AL. *against* **KATHARE.** *Windham*, 1817.

IN an action, by several plaintiffs, if one a *feme sole* marry, pending the suit, and the husband, do not appear, and enter his name, and recognizance, by the third day of the term, next ensuing; on the defendants entering the certificate of the marriage; the Court will dismiss the suit, with costs, even without a plea of abatement, offered by defendant.

No. 12.

POTTER *against* **WRIGHT.** *Bennington*, 1816.

IN an action of trespass against a minor, the writ will not abate, because the guardian of the minor was not notified.

No. 13.

ROGERS *against* **BRACE.** *Bennington*, 1819.

WRIT of error. Plea in abatement. That the writ was

signed in January 1818, and made returnable to January Term 1819, whereas it ought to have been returnable to, and entered at September Term 1819. By the Court. The Statute 3, Vol. p. 32 Sec. 1. is imperative, that all writs &c. shall be made returnable to the Supreme Court next to be holden in the same county. Writs of error cannot be excepted by any construction of the act. See Freehold Court.

Judgment. That writ abate.

ACCOUNT.

No. 1.

WHITMORE *against* **ORCUTT.** *Windsor*, 1816.

AN action of account will lie in this State, where the plaintiff and defendant both reside in the State of New-Hampshire, and the plaintiff claims an account of profits, in locks and canals, in the state of New-Hampshire, received by defendant as co-partner or co-tenant with the plaintiff.

No. 2.

ROBINSON ADMINISTRATRIX *against* **WRIGHT.** *Bennington* 1817.

A declaration, in an action of account, by the administratrix, against one, a surviving partner, in the business of attornies, with the intestate as bailiff and receiver, is good; altho the declaration does not aver *of what* the defendant was bailiff, and although, it does not aver *of whom* defendant received &c.—Declaration held good on *general* demurrer. See Assumpsit 4.

ACTION.

WRIGHT *against* **HICKSON.** *Bennington*, 1817.

AN action may be maintained, against one, of several joint

and several obligees, without stating in the declaration, that the others, are without the jurisdiction of the court.

On the case, see Assumpsit 2. Ex. & Ad. 13. Fraud. Jurisdiction 9. Malicious Prosecution.

ADMINISTRATOR.

SEE Executors and Administrators.

ALIEN ENEMY.

SEE Abatement No. 5.

APPEAL.

No. 1.

PAGE *against* BARNEY ET AL. *Rutland*, 1816.

AN appeal or review may be had from a judgment rendered on a bond given by a deputy Jailer to the Sheriff or Jailer.

No. 2.

GROSVENOR *against* GRANT. *Franklin*, 1816.

THE Supreme Court will not dismiss an appeal, on the ground that the County Court ordered a *finaliter* made against the party appealing to be erased from the docket.—See Abatement, No. 7.

ARBITRATION.

SEE Evidence, 15. Ex. & Ad. 8.

ARBITRATION NOTES.

SEE Award No. 2.

Note.—Since the decision alluded to, in the case of Bellows vs. Barnard, the Supreme Court have decided in the case of Bagley vs. Wiswall, Addison 1819, that arbitration notes are valid.

ARREST.

SEE Audita Querela 6. Assumpsit 3.

ASSUMPSIT.

No. 1.

VERMONT STATE BANK *against* **JOHN STODDARD.** *Franklin*, 1816.

AN action for money had and received will lie to recover the balance due on a note given up (unpaid) by mistake; when the note was given for money loaned.

No. 2.

SELECTMEN OF NEWBURY *against* **JOHNSON.** *Orange*, 1816.

SELECTMEN, in their official capacity, cannot maintain an action against a surveyor of highways for damages sustained by the town in an individual's being injured by an unrepaired state of the road. The action ought to have been brought against the town. An action of assumpsit will not lie in the above case, it ought to have been a special action on the case.

No. 3.

FLAGG *against* **WALKER.** *Rutland*, 1817.

A *promise*, made to a Sheriff, who had suffered an execution to run out in his hands in *consideration* that he would not take out an alias execution, is void for want of *consideration;* the Sheriff having no authority to pray out execution unless directed or empowered by the creditor; no costs were allowed in this case the decision being made on motion in arrest, by defendant.

No. 4.

THOMPSON *against* **BABCOCK.** *Windsor*, 1817.

IN this case, the plaintiff had mortgaged a lot of land to de-

fendant, and also to one Burbank by a subsequent deed of mortgage; afterwards the plaintiff executed a deed absolute to Burbank and delivered the same to Babcock to enable him to pass the title to Burbank, on such terms as should be agreed upon between the defendant and Burbank: It was in proof that the plaintiff acknowledged he took a bond from Babcock on delivering him the deed conditioned for the re-delivery of the deed in case the contract was not closed with Burbank, and that the bond was given up to said Babcock on a settlement, so far as it related to said bond; Babcock received of Burbank, on delivering him the deed, notes of hand against a third person, and a quantity of paper, amounting in the whole at its nominal value to $ 161,88, more than was due to Babcock from Thompson, secured by the mortgage aforesaid. Three questions were reserved.

1. Did the evidence support the action for money had and received?

2. Did not the execution of the bond preclude the plaintiff from maintaining any action except upon the bond?

3. Ought not the action to have been account?

The Court considered, that the defendant was not authorised by any usage or custom to sell for any thing but money, and if he did he was liable as for money had and received.

From the fact of the bond having been given up to the defendant, plaintiff need not produce it, and the consideration of the bond was distinct from that for which the action was brought.

That even if the action of account would lie it did not preclude the present action.

No. 5.

CHACE *against* MAY. *Orange*, 1817.

THE plaintiff in error, as attorney for one Farcraft, had recovered a judgment in an action on note, in which suit, no costs were taxed, for that he had also recovered a judgment in ejectment for lands mortgaged to secure the payment.

In consideration that the plaintiff would discharge the judgment and execution on the note, and take a deed of the land, the defendant paid the amount of the costs in the *suit on the note* being about nineteen dollars. The Court decided this money could not be recovered back as being taken oppressively, or by taking undue advantage of the plaintiffs situation: the plaintiff in error had a legal right to refuse the settlement, and had a right to a consideration for making it.

ATTORNEY.

No. 1.

STATE *against* DEAN. *Caledonia*, 1819.

THIS was an Indictment, for a misdemeanor in procuring a witness to leave the State, so that he could not be had to testify on the trial of an Indictment for a rape.

The respondent had appeared, at a former term, and given bonds for his appearance from term to term &c. The question was whether he could now appear by attorney; and the *Court* decided, that he might *appear* and *plead* by attorney as the punishment would not induce legal infamy, and the respondent had once appeared and given bonds, so that a suitable fine was secured.

No. 2.

SHELDON *against* KELSEYS. *Rutland*, 1819.

Audita Querela. THE complainant alledged that an attorney had brought an action against the defendants in the name of the plaintiff, but without the consent or knowledge of the plaintiff, that judgment was rendered in favor of the defendants, to recover their costs, and the defendants caused an execution to issue against the plaintiffs for the said bill of costs. This writ was brought to set aside the said execution: Demurrer. For defendants, Mallory contended, that it would impose a severe hard-

ship on defendants, if after having contended for years, and finally succeeding, they must prove that their antagonist authorized the suit. Contra, Langdon for complainant.

That he was entitled to relief upon the general principles, that the Court will relieve where the party has had no day in Court, or where a judgment has been obtained against him without his consent or knowledge.

Judgment, that the complaint is insufficient.

See Assumpsit 5.

AUDITA QUERELA.

No. 1.

TUTTLE *against* TOWN OF BURLINGTON. *Chittenden*, 1815.

AUDITA QUERELA will not lie, to set aside a judgment, where the original action was on a promissory note, a default suffered, and judgment rendered for an amount of damages, larger than principal and interest. (In this case the *error* was apparent of record.)

No. 2.

JUDD *against* DOWNING & HAZELTINE. *Addison*, 1816.

AN Audita Querela will lie to set aside a judgment rendered by a Justice Peace against an infant, who had no guardian notified, or appointed by the Court.

No. 3.

SOLACE *against* DOWNING & HAZELTINE. *Addison*, 1816.

WHERE a Judgment is rendered, as in the preceding case against a minor, and execution issues, and the officer neglects to collect, and is sued, and judgment is rendered against him by default; an Audita Querela will *not* lie to relieve the officer, against the judgment, while the judgment against the infant remains in full force.

No. 4.

CATLIN *against* JEWELL. *Franklin*, 1816.

A Judgment is not reversed, when from the record it appears there had been no pleading on the *Audita Querela* brought to set the judgment aside, and the only record of the proceedings on the Audita Querela is "Judgment that the plea of defendant is insufficient and that the plaintiff take no costs." A subsequent judgment rendered in the original suit is erroneous and void,

No. 5.

WEED *against* NUTTING. *Franklin*, 1816.

A Judgment, and execution of Justice Peace, in which a larger sum is given in *costs* than is allowed by the Statute, will be set aside on Audita Querela.

No. 6.

SESSIONS *against* GILBERT. *Rutland*, 1817.

An Audita Querela, to set aside an execution.

THE complaint alledged that on &c. the said Sessions made a settlement with said Gilbert of all demands subsisting between them, and then and there paid to the said Gilbert's full satisfaction all and every demand the said Gilbert held against him, from the beginning of time to that date (except &c.;) and that the said Gilbert in consideration of the sum of ten dollars, then and there received, made, executed and delivered to the said Sessions a discharge of and from all demands, of every description name or nature from the beginning of time to the date thereof (except, &c.) which said receipt or discharge bears date the same 19th day of May 1812 aforesaid, and is signed by the proper hand of him the said Gilbert; and that said Gilbert then and there promised that he would discharge said execution.

On motion in Court to set aside the verdict for insufficiency of the declaration, Court decided against the motion in arrest.

See Attorney 2,

AWARD.

No. 1.

ANONYMOUS. *Caledonia.* 1816.

AN award ordering acts to be done by both parties, within a certain time; the party who refuses to perform, in the time specified in the award, cannot afterwards compel the other to perform the award.

No. 2.

BELLOWS *against* BARNARD. *Caledonia*, 1817.

WHERE there were articles of submission to Arbitrators, though no express promise to abide the award, and no express power given, to award money, and no express power given to award releases, and notes were given to enforce the award, and put into the hands of the Arbitrators to be endorsed down.

THE Court held, that the parties were bound by the award, that the awarding releases was good, that the awarding money was good, and that an action of assumpsit on the *award* could be maintained. Arbitration *notes* have been decided by the Supreme Court to be void.

B.

BAIL.

No. 1.

STEVENS *against* ADAMS. *Chittenden*, 1819.

IN order to hold the bail on a writ, it is sufficient that the return of non est inventus, be written on the execution within 60 days from the rendition of the judgement, and the execution returned into office in a reasonable time after the 60 days.

The date of an officer's certificate is *prima facie* evidence that the certificate was made at the time of the date thereof.

SCIRE FACIAS against bail on a writ of attachment. The plaintiff declared, that on the 25th day of August 1815, he prayed out a writ of attachment, in his favour, against Luther Whit-

ney, which was served, and Charles Adams the defendant became bail; that at the February Term of Chittenden County Court in 1816, he recovered judgement, in his favour, against the said Whitney, for the sum of $126,64 damages and $15,72 costs; that on the 16th day of March 1816, the said Stevens took out a writ of execution in common form on said judgment, and in due time delivered the same to Heman Lowry, Sheriff of Chittenden County, to collect and return; that on the 15th day of May 1816, and within sixty days from the rendition of said judgment, and within sixty days from the date of said execution, the said Heman Lowry regularly made his return on said execution, "that he had made diligent search, &c." and afterwards, on the 16th day of May 1816, the execution was returned into the office of the Clerk of the County Court with the said return legally thereon endorsed.

Plea. That no return of non est inventus was regularly made on said execution within 60 days from the rendition of said judgment, and traverses the return of the officer.

Issue of fact and verdict for plaintiff.

On the trial, the plaintiff offered in evidence, a certified copy of said execution, on which was written a return of *non est inventus* bearing date the 15th May 1816, and a minute of its return into office 16th May 1816. The defendant objected, 1st that the return of the officer is not evidence between these parties, 2d that the execution was not returned into office until *after*, sixty days, from the rendition of the judgment, had expired. Objections overruled and evidence admitted. Exceptions by defendant and motion for new trial.

In support of the motion, it was contended:

That a question arises on the construction of the words of the act (1 vol. p. 67) "the bail shall in no way be holden unless the creditor shall *within* sixty days cause a return of *non est inventus* to be regularly made on the execution" whether this *return* is the writing of the certificate by the officer on the back of the writ of execution, or the actual return of the execution into the clerk's office? Whatever may constitute the re-

turn, it should be made *within* sixty days from the rendition of the judgment. If the officer's certificate be sufficient, it should appear when that certificate was made. In this case the officer does not certify that the return, i. e. the certificate, was made on the 15th but only on that day and often before he made diligent search, &c. The copy of the execution in this case furnished no evidence of the time when the return was made, and was improperly admitted. That the filing the execution, with the clerk within the sixty days constitutes the *return* and is necessary in order to charge the bail.

Contra. That the execution need not be actually returned into the clerk's office, within the sixty days in order to hold the bail on mesne process. 1 stat. p. 67, 94.

By the Court. 1. The date of an officers certificate is prima facie evidence that such certificate was actually made, at the time of the date thereof, and in this case the copy and certificate were properly admitted as evidence of the facts therein mentioned.

2. That the duty of the bail is, to deliver the principal either in court, or to the officer who may have the execution; but our statute has imposed a duty on the creditor that he shall use a certain degree of diligence in causing the principal to be apprehended, or in obtaining satisfaction of his judgement he "shall, within sixty days from the rendition of final judgment on said process, cause execution issuing thereon to be levied on the goods, chattels or body of the defendant or defendants; or cause a return of non est inventus to be regularly made thereon" when the creditor has performed the acts required of him the bail must still be responsible for the surrender of the principal, if he levy on the goods if they fail to produce satisfaction or if he cause a return of non est, &c. The object of the statute is, not to give notice to the bail, *as no return within sixty days* is required in case of levy on goods, but the object is to require search to be made for the principal, and the evidence of such search, &c. to be certified within the sixty days by a legal return of non est inventus *on* the execution: It is suffi-

cient, that the certificate of the officer, shewing that search, &c. be written on the execution, within sixty days from the rendition of the judgment, and the execution be returned into office in a reasonable time thereafter.

Motion dismissed. Judgment rendered on verdict.

No. 2.

HOOKER *against* DANIELS & SLASSON. *Rutland*, 1820.

Where a debtor was confined, in the limits on bonds, and the creditor executed and delivered to him a writing, by which he agrees to certain conditions; "If the debtor chooses to leave the limits," such an agreement may be revoked before the debtor leaves the limits, or any act is done injurious to him or his bail.

The effect of such revocation, or of fraud in obtaining the licence or agreement, is the same both as to the debtor and his bail, in case the situation of the bail has been in no way changed by reason of the existence of such licence or agreement.

THIS was an action on gaol bond, against Daniels, as principal, and Slosson, as surety. Plea in bar, that Daniels, the prisoner, escaped by license of the plaintiff. Traverse, on the trial, at September Term, 1819, the defendant, to maintain and prove their plea aforesaid, gave the following writing in evidence to the jury: "If M'Daniels chooses to go home, I will "engage, that I will not call on him until I can ascertain wheth- "er there can be any thing collected of his son John, and if I "can secure the payment of the demand of John, in one year, I "will not call on the old gentleman at all, but will give him a full "discharge; at any rate, I will try until the first of November "next, to make the business secure of John, before I call on the "old man again, and if I cannot secure the debt of John, I may "after the first day of November next, call on the old man again.

"Rutland, 6th July, 1817. REUBEN R. THRALL."

Thrall was the owner of the demand. To obviate the effects of said writing the plaintiff offered evidence, to prove that after the execution and delivery of said writing by plaintiff to said Daniels, and before his departure from prison, the plaintiff countermanded said writing, which evidence was objected to by the defendants, and rejected by the judge as irrelevant to the issue. The plaintiff offered evidence to prove that the writing aforesaid

was obtained by fraud, which evidence was admitted. The judge instructed the jury that the plaintiff could not avail himself of the fraud, to do away the effect of the writing, unless he carried the knowledge of the fraud home to Slasson, the bail, so as to make him a party to it. Verdict for plaintiff, and motion for new trial, founded on exceptions to the opinions and charge of the judge.

In support of the motion, Williams and Smith, for plaintiff.

This bill of exceptions, presents two questions.

1st. Is a licence given without consideration revocable before any act has been done in pursuance of such licence, which injures or prejudices the defendants.

2d. Is a licence or consent obtained by fraud or imposition of one of the defendants, of any avail to him or his co-obligor.

1st. The consent in this case was a mere naked, voluntary licence, unsupported by any good or valuable consideration for the *forbearance* therein promised, the ultimate security of the debt was lost by the departure with that licence; A licence without a consideration, is revocable at any time before a departure from the limits. It is believed no instance can be found where a mere naked voluntary licence may not be withdrawn previous to the doing of the act licenced. The cases under this head are familiar. Oyniors case, 8 Coke's Rep. 162.

Viewing this writing, on the ground on which plaintiff gave it *a proposition* to Daniels (and this is the most favorable ground for defendants) it is revocable or may be withdrawn: A proposition may be withdrawn at any time before it is accepted, at any time before the act which manifests the acceptance, as in this case by the act of departure from the prison limits.—Powel on Contracts, 1 vol. 334.

Both must be bound or neither, Daniels could not be bound until he left the limits, neither was plantiff bound until then, and might revoke or withdraw his proposition.

2d. What is the nature of defendants undertaking or bond? Daniels contracts that he will remain within the liberties, and will not depart until lawfully discharged, &c. Slasson is security, that Daniels shall fulfil this engagement; the defendants as

to this contract, cannot be severed, both must be bound or neither. This writing, if not revoked, cannot discharge the bond if obtained by fraud and imposition. A discharge obtained by fraud is no discharge, it is *void*. Roberts on fraud &c. 520 et seq. Daniels has therefore broken the condition of the bond, for the performance of which condition Slasson was surety; if A as principal, and B as surety, execute a note or bond to C will a discharge obtained by A from C, by fraud, discharge A and B if B is not a party to that fraud? it is clear that it will not, this case is not distinguishable in principle from the present. This case is believed to be fully decided by the case in Bacon vol 2, 521 et seq.

Contra,—Langdon and Page.

1. That the writing set forth, is an agreement which took effect from the delivery and could not be dissolved, but by mutual consent of the parties, the delivery of the writing vested a right in the principal and bail which could not be revoked, 9 Mass. Rep. 310, 3 Coke, Lit. 36, Note 223.

2. Fraud vitiates every act *between the parties to the fraud*, but no farther; fraud, in obtaining the writing by Daniels of the plaintiff, without the privity of the bail, does not affect the bail. If Daniels had fraudulently obtained a discharge from prison, by taking the poor debtor's oath, it would still be a discharge of the bail. 2 Tyler, 409, 2 Cranch, 300. Jones, Smith & Co. *v.* Querton, in this Court, January term, 1818.

3. If the writing should be considered a licence, and revocable, the revocation ought to have been pleaded, and is not pertinent evidence under this issue. Saund. 300, 1 Chit. 567.

4. That the consent of the plaintiff, to the departure of Daniels from the liberties of the prison, and a consequent departure, is at all events, a discharge of the bail.

In reply :—That there could be no replication to the licence, as it was not pleaded, the plea was merely that debtor escaped *with consent of the plaintiff*; the *writing* was merely given in *evidence*, and could be met *only*, by *evidence* to prove that the writing was not in force, at the time of departure from the limits. Opinion of the Court.

That the writing given in evidence, by the defendants was revocable, before a departure from the prison liberties, or any consequent act done injurious to the defendants, and that evidence of the revocation ought to have been admitted.

2. That the charge of the Judge was *incorrect* in directing the Jury "that the plaintiff could not avail himself of the fraud, unless he carried the knowledge of the fraud home to Slosson, the bail," so as to make him a party to it. Whatever might be the effect of the licence or consent in writing, good upon the face of it, in case the bail had been imposed upon by such *apparently* good and valid licence, and had been induced *thereby*, to consent to the departure of the principal from the limits, or had relinquished security, or in any other way, changed his situation; still in this case, where it does not appear, that the situation of the bail was in the least changed, after the writing was given, or that he knew of its existence, the effect of the revocation, and the fraud in Daniels alone, in obtaining the licence, must be the same as to both defendants.

3. *Evidence* of the revocation was proper under those pleadings; as this particular licence was not pleaded, but only given in *evidence*, it could be met by *evidence* only.

Judgment, that verdict be set aside, and new trial granted.

No. 3.

BOARDMAN *against* **STONE.** *Chittenden*, 1815.

DEATH of the principal *after* a return of *non est inventus*, will not discharge the bail on the back of the writ.

NOTE.—Since this decision, an act passed November 11, 1818, has provided, That the principal dying before final judgment on scire facias, bail to be discharged. Acts of 1818, p. 75.

No. 4.

HALL *against* **STEARNS.** *Franklin*, 1816.

BAIL is excused for not surrendering his principal, where the principal was confined in the State Prison of another State, pre-

vious to the bail becoming fixed, i. e. before the return of non est inventus on the execution.

No. 5.

HOY *against* **HERRINGTON.** *Rutland*, 1817.

BAIL, for the review of a cause by the defendant, is not discharged by the death of the defendant, in a case, where the administrator appeared, and judgment was rendered in favor of the plaintiff.

See Poor Debtor, 2, 3.

BAIL BOND.

No. 1.

ENOS *against* **FENNO.** *Windsor*, 1816.

IN an action on Jail Bond, by Sheriff against the debtor, defendant pleaded that creditor agreed and consented to his leaving the liberties, and introduced a writing to prove the issue, of the following tenor: "This may certify, I have agreed with Benjamin Fenno, that if he goes home and breaks his Jail bond in favor of me, signed by himself and Jacob Dimick, that if I shall sue said bond, the execution shall not be charged against said Dimick, but only against said Fenno, as witness my hand.

URIAH HAYES."

It was held, this was proper testimony, and would discharge the bond, not only against the bail, but against the principal debtor: That a discharge by the party, to one obligor, was a discharge to all.

No. 2.

SHELDON *against* **KELSEY.** *Rutland*, 1817.

WHERE process issued, in favor of Moses Sheldon, of Rupert, and Judgment thereon, and execution prayed outin favor

of Moses Sheldon, of Fairhaven, (it appearing from the pleadings there was such a person as Moses Sheldon, of Rupert,) a Jail bond, executed in consequence of commitment on such execution, is void. This was a case, where the execution on the Jail bond was in favor of Moses Sheldon, of Fairhaven.

No. 3.

WAIT *against* **DANA.** *Caledonia*, 1817.

IF a plaintiff, assignee of a bail bond, agrees to have a suit thereon, reviewed on nominal bail, whereby the debt is lost, the Sheriff is exonerated.

Any departure of a prisoner (committed on final process, from the Jail, i. e. the house, by the consent of the Sheriff, though there is a voluntary return, before action is brought, is an escape, for which the Sheriff is liable. The circumstances of the prisoner's property may be shewn by the Sheriff, to reduce the damages against him, though the escape was voluntary. This was the case of an execution issued on an action of debt.

No. 4.

ROBERTS *against* **WELLS.** *Bennington*, 1816.

IN an action on Jail bond, where it appeared, by the declaration, that the debtor was committed after the life of the execution had expired, and judgment thereon rendered by default.

Judgment set aside by writ of error.

See Poor Debtor, 4.

BANKRUPTCY.

PERDY *against* **WALKER.** *Bennington* 1816.

IN Error. A note was given by Perdy, of Troy, in New-York, at said Troy, to J. A. of Manchester, in the State of Vermont, and afterwards at said Manchester, in Vermont, en-

dorsed to H. Walker, of said Manchester: Afterwards said Perdy took the benefit of the bankrupt law, in the State of New-York, and plead this in bar of the present action, brought by H. Walker on the note. Held bad on general demurrer.

BAR.

See Promissory Note, 4. Insolvent Estate, 1, 2. Ex. & Ad. 13.

BASTARDY.

CLAFLIN *against* HUBBARD. *Windham*, 1817.

CERTIORARI is the proper process, to bring before the Supreme Court, the record in a case of bastardy. In case the County Court rendered judgment for costs, in favor of the defendant, on his being found not chargeable, this Court will quash the order or judgment, so far as relates to costs.

BOND.

No. 1.

CAMPBELL *against* CAMPBELL ET AL. *Windsor*, 1816.

A bond in these words: "We, A. B. and C. D. are jointly and severally bound," and signed and sealed by A. B., C. D. and E. F., is good against E. F.

No. 2.

BULKLY ET AL. *against* SMITH ET AL. *Franklin*, 1816.

A replevin bond, in a case where property is replevied as an adversary suit, to try the right of property, is void; no replevin can be maintained, except in cases provided by the statute.

NOTE.—At the next term in Franklin County, 1817, to which this cause was reviewed, this decision was reversed, and the Court decided, That the defendants cannot plead in bar, to avoid this bond, their own wrong, and that they executed said bond to return property taken by them on an illegal and void replevin, to wit. one brought to try the right of property, and not under the statute.

Judgment, that the plea is insufficient, and that plaintiffs recover their debt.

BOOK.

No. 1.

WHELPLEY *against* **HIGLY.** *Rutland*, 1816.

AN order drawn requesting the delivery of a waggon upon a special contract, expressed in the order, as to the time and manner of payment, precludes an action on *book*.

No. 2.

HITCHCOCK *against* **SMITH.** *Rutland*, 1816.

AN action on book will not lie for the use and occupancy of land.

No. 3.

AMES ET AL. *against* **FISHER.** *Windham*, 1817.

ACTION on book; the only charge was, a domestick spinning Jenny, at $60. Court decided that the action could not be maintained.

No. 4.

FIELD, GATES & CO. *against* **SAWYER.** *Windham*, 1818.

ACTION on book. Defendant prays oyer of plaintiff's book of account, and it is read as follows:

Mr. ZADOCK SAWYER,

	To FIELD, GATES & Co.	Dr.
1816. March 14.	To 1 Hhd. Gin, 116 gallons, will reduce 2 to 9, making 141 galls. at 75 cts.	$ 105,75
	Hhd. for Do.	3,00
		$108,75

Mr. Everett for the defendant, objected, That the said item of charge as aforesaid, does not give the plaintiffs a claim, in an action on book account. The 2d sec. of the act, vol. 1, 237, sustains the action of account, on book accounts, and the proper form is prescribed by statute. This does not alter the *principle* of the action of account lying at the common law. That the existence of *privity*, or credit by an open interchange of commodities, which gives rise to the specified charges as they may appear on producing the books is that *privity* which is necessary, at the common law to sustain the action of account. Coke 1, 172. Lilly, Ab. 1, 18. Wood's Institutes, 557. Shepard's Touchstone, 10. By these authorities the action of account could, at common law, be sustained *only*, 1. Against Guardian. 2. Bailiff. 3. Receiver. Or, in case where a *privity* existed in deed or fact, by consent of the parties, as in the two cases, where the defendant might be charged as Bailiff or Receiver. And the case of *privity in law*, as where the defendant may be charged as guardian in socage.

The item on the books of the plaintiffs is against a *stranger*, and a single item amounting to $108,75; as well might the plaintiffs charge the defendant with a horse, an ox or a farm, which would not be admitted.

This form of action is not to be found unless fairly and obviously within the statute provision. For,

1. It is more expensive. 2. It in effect, takes away the trial by Jury. 3. It admits the testimony of the party in his own cause. The object obtained with these sacrifices, in cases of charge for a single item, is only substituting the poorer for the better form of action. The case of Ames et al. *v.* Fisher, is strictly in point.

Contra, Hubbard, for plaintiff. The law has not precisely pointed out all the articles which are the proper subjects of book account; the general rule, however, is, that the charge must be confined to transactions between the parties, where in the usual course of their business, they charge on book, articles sold and delivered, services performed, the use of personal chattels, &c.

Swift's Ev. 83. The rule of evidence is, that the parties may testify, as to the price and quality of the article, and the time and mode of payment. Same.

Thus, goods sold at the common retail stores in the country, articles made and sold by common mechanics to their customers; articles also that are sold at wholesale, are the usual and proper subjects of book account; it is not the value or amount of the article which prevents its being the subject of book account, but it is the nature of the article. Thus, hogsheads or barrels of rum may be charged as well as quarts, &c. The case of Ames et al. *v.* Fisher, would serve in some degree, to narrow the subjects of book charge; but in that case the principal objection was, that from the nature of the article, there could be no known standard for the price, and therefore the defendant might be exposed to great fraud and injustice; but in the present case, the value of the gin and hogshead are known as well as any other articles.

The Court decided, to sustain the action, and rendered Judgment to account.

See Set-Off, 3. New Trial, 5.

C.

CERTIORARI—See Bastardy.

CHALLENGE—See New Trial, 11.

CITATION—See Poor Debtor.

COLLECTOR OF CUSTOMS—See Distribution, 1, 2.

COMMISSION.

FERGUSON *against* MORRILL. *Caledonia*, 1818.

WHERE a commission to take testimony in a foreign country, i. e. out of the United States, issues, it must direct the party praying out the commission, to notify the adverse party of the

time and place of taking the depositions, and such notice must be proved to the court, before the depositions can be read in evidence.

COMMISSIONERS.

EXECUTORS OF DOOLITTLE *against* HUNSDEN. *Addison*, 1820.

The report of commissioners, on an insolvent estate, made in favor of the estate, for a balance, on adjustment of *mutual* claims, merges all the original claims, and no action can be sustained, except for the balance.

THIS was an action on note executed, &c. in the life time of the testator, to wit, on the 12th day of December, 1803, for $61, 18. Plea in bar, that on the 3d day of March, 1807, plaintiffs, as executors, represented the estate of said Doolittle insolvent, that commissioners were appointed, that defendant presented a claim against said estate, for allowance, and the executors presented to said commissioners, for allowance and adjustment, the note aforesaid; and the commissioners adjusted these mutual claims, and reported a balance of $38,11, as due to the estate, which report was duly accepted, and remains of record. Demurrer.

Phelps, in support of the demurrer. That the duty of commissioners is to adjust the demands *against* the estate only, that the statute of 1798, 1 vol. p. 164, sec. 3, extends to claims in *favor* of the estate, necessarily involved in the discharge of that duty, but no further than *these* claims are merged in the claims *against* the estate; when there appears a balance in *favor* of the estate, the commissioners have no concern with it, there is an ample remedy in the ordinary courts of justice: The Judge of Probate could make no order upon the balance found due the estate, and the administrator must be left to the usual remedy in the courts of general jurisdiction, as if no proceedings were had before the commissioners, and this remedy is amply sufficient.

That no appeal is allowed, where the balance is in *favor* of the estate: That the only remedy of the executor must be on the original security; for the commissioners being concerned

only with claims *against* the estate, they have discharged their duty when they have disposed of such claims; they are a court of special jurisdiction, and their authority is not to be extended by implication; and there is no mode pointed out in which to enforce their report in *favor* of an estate.

Contra, Holly. That in case of an insolvent estate and mutual claims exhibited to commissioners, the judgment of the commissioners is conclusive on both parties, and merges all the original claims; that the only remedy is on the judgment of the commissioners.

Opinion of the Court. The report of the commissioners appointed on an insolvent estate, made on matters cognizable by them, has all the effects of a judgment.

The effect of a judgment on the rights of the parties, does not depend on the mode of executing that judgment, as an award merges all claims submitted, and is equally conclusive with the judgment of a court of record, though no execution can issue to enforce the award.

By the act of 1798, all mutual claims may be submitted to the commissioners, and they shall adjust the same and report the balance; thus jurisdiction is given to them over such mutual claims, and they must necessarily adjudicate upon all the claims upon *both* sides, and their decision must be conclusive. It cannot be in the power of the administrator or executor to bring an action on the original demand in favor of the estate, and thus try over again the questions decided by the commissioners. If there are numerous claims in favor of the estate, and a small balance found due the estate, which claim shall the administrator sue, and which shall be merged?

The only plain and feasible rule must be, to consider the report of the commissioners as an *adjudication* conclusive upon both parties, and the balance in the nature of a judgment, and to be enforced by action, as an award would be, or as a judgment after one year from its rendition, when action of debt is brought.

Judgment, that plea in bar is sufficient.

COMMITMENT—See Bail Bond, No. 4.

CONDITION PRECEDENT.

WHERE an action in favor of A. v. B. for infringement of a patent right is pending in the Circuit Court, and B. and C. being equally interested in the *question*, it is agreed between them, that in case judgment be rendered against B. and that he would prosecute the suit to the Supreme Court of the United States, and defend the same therein; or in case judgment should be rendered against A. and he should carry the suit to the Supreme Court, for a final decision; and the said B. should defend the same in said Supreme Court; that in such case C. would pay to B. an equal share of all expences arising in defence of said suit. Held, that the prosecution of said suit to the Supreme Court, and litigation thereof in said Court, was a condition *precedent* to any claim on C. for contribution to the expence, and that C. could not be compelled to pay any part of the expence of defending said suit in the Circuit Court, although it appeared to the Court that the decision of that Court was final, and that the cause could not be carried to the Supreme Court

JOHN PENFIELD *against* LAVIUS FILLMORE. *Rutland*, 1820.

Declaration. In a plea of the case, for this, to wit, That whereas, at the time of making the agreement and promises herein after mentioned, one Oliver Evans, of Philadelphia, in the State of Pennsylvania, had commenced a suit at the Circuit Court (of the United States) against the plaintiff for using an elevating strap to raise meal when ground, from the mill stones into the bolt, for which the said Oliver claims an exclusive right, by virtue of an act of Congress, passed for his relief. And the defendant and several other persons, to wit, Moses Leonard, John Warren and Charles Rich, as mill owners and users of said elevators, in their mills, were interested, that the legality of the claims of said Oliver Evans, in that respect, should be ascertained and decided, they and the plaintiff supposing, that there was no exclusive right in said Oliver Evans or any other person to use the said elevating straps for the purposes aforesaid; and thereupon, afterwards, to wit, at Middlebury aforesaid, on the 17th day of August, 1811, and when the said suit was depending, it was agreed by and between the defendant and the said Moses Leonard, John Warren and Charles Rich, in consideration of the premises, that, in case Judgment should be

rendered against the plaintiff, and that he the plaintiff would prosecute to, and defend the same in the Supreme Court of the United States, or in case Judgment should be rendered against the said Oliver, and he should carry the same to the Supreme Court of the U. States for a final decision, and that he, the plaintiff should defend the same in said Supreme Court of the United States, that in that case, he, the said defendant, and the said Moses Leonard, John Warren and Charles Rich, each of them, should and would individually, pay or cause to be paid, to the plaintiff, an equal share of all the expences arising in the defence of said suit, in proportion to the number of elevating straps by each of them then used, in their respective mills. And the plaintiff avers that the defendant then used, to wit, on the day and year last aforesaid, four elevating straps. And the said agreement being so made as aforesaid, he, the defendant, afterwards, to wit, on the day and year last aforesaid, in consideration that the plaintiff, at the special instance and request of the defendant, had undertaken and faithfully promised the defendant, that he, the plaintiff would perform and fulfil said agreement, on his part, undertook, and then and there faithfully promised the plaintiff, that he, the defendant, would perform the said agreement on his part: And the said plaintiff in fact saith, that relying on said agreement, promise and undertaking of defendant, he did after the making thereof, go on with the defence of said suit, and did duly, regularly, and to the best of his knowledge and ability, defend the said suit, until the term of the Circuit Court, in October, 1812, at which term the same was finally ended and determined, in favor of the said Oliver Evans, who, at the same term, recovered Judgment against the plaintiff, in said action, for the sum of $79,30, damages and costs, which the plaintiff has been compelled to pay, and has actually paid: And the plaintiff avers, that the said Judgment was a final Judgment, and could not be re-examined, varied or affirmed in the Supreme Court of the United States, so that plaintiff could not carry the same to the said Supreme Court, for a final decision, and there defend the same. And the plaintiff in fact saith, that in consequence of his

defending said suit, he has been obliged to pay, and has paid $200 over and above the sum so recovered against him, as aforesaid, and the share and proportion of defendant, of the said money, so charged and paid by plaintiff as aforesaid, in proportion to the four straps so by him used as aforesaid, in his said mill, amounts to a large sum of money, to wit, eighty dollars, of which defendant on, &c. had notice, and thereby became liable to pay, &c.

Demurrer and Joinder.

D. Chipman, for defendant. It was contended, That the prosecution of the suit, Evans against the plaintiff, and defence of the same in the Supreme Court of the United States, was a condition *precedent*, and the right of action could not exist until the performance of that condition. 1 Chitty 311. 6 Tem. Rep. 710, 719.

Contra, Williams. That the plaintiff is entitled to recover, because it appears he has done all which he was bound to do, by virtue of the agreement declared on. The Judgment rendered by the Circuit Court, could not be carried to the Supreme Court of the United States. Grayden's Digest, 215.

It will be found, that the act of Congress referred to, in the agreement, authorized the Secretary of State, to issue a patent to Oliver Evans, for certain inventions claimed by him. The action against the plaintiff was brought, for infringing that patent: It was the trial of that action in the *Circuit Court* which was equally interesting to the plaintiff and defendant, and the other signers of the agreement, and the Judgment to be rendered in *that Court* which alone could be beneficial to the persons making the agreement: For, it will be observed, on referring to the laws of the United States, 1 Graydon, 333, sec. 6, that, if upon the trial of an action, brought by the patentee, for the infringement of his patent, in the Circuit Court, Judgment shall be rendered for the defendant, in the case therein specified, the Court shall declare the patent void. It was the trial and judgment in the *Circuit Court* which the persons making the agreement contemplated, and which alone was beneficial to them; and the cause was to be carried to the *Supreme Court*, only, in case some question of law should arise, which might render it necessary that a decision

should be had, by that tribunal, but the beneficial trial and judgment must in the end, be had and rendered in the Circuit Court. The cause of Evans against the plaintiff, having been defended so far as was practicable, and the law not permitting the plaintiff to carry it any farther, although the decision in the end, proved unfortunate for both plaintiff and defendant, it is apprehended, the defendant ought to contribute his share of the expences, when he would have reaped the full benefit, had the suit terminated otherwise, by the patent being declared void.

Opinion of the Court. The Court consider the litigation of the suit, in favor of Evans against the present plaintiff, in the *Supreme Court* of the United States, as stated in the agreement declared upon, to be a condition *precedent*. The court are to compel the performance of contracts, according to the agreement of the parties. In this case, the defendant's promise was founded on the consideration of contemplated litigation of the suit, in the *Supreme Court*, this consideration, as agreed upon by the parties, was the motive to the promise, and to compel the defendant to fulfil a contract upon a different consideration, would bind him to a contract, to which he never assented: No agreement was made or required to contribute money on account of the expences in the Circuit Court.

Judgment, that declaration is insufficient.

Williams for plaintiff, *Chipman* for defendant.

CONSIDERATION—See Condition Precedent—Assumpsit 3, 5—Deed, Ex. and Ad. 7.

CONDEMNATION.

No. 1.

EDWARDS *against* ADAMS. *Caledonia*, 1817.

In an action of trespass, for taking personal property, a condemnation under the non-intercourse act of Vermont, of 1812 is proper evidence to the Jury, to justify the defendant's taking.

No. 2.

SHAW ET AL. *against* JOHNSON ET AL. *Caledonia*, 1817.

IN a case where defendants petitioned for a new trial, which was granted, and judgment final was in favor of defendants; the Court decided the defendants were entitled te all costs from the commencement of the original action: The Supreme Court have decided, that where judgment final is rendered in favor of a party moving in arrest, he is not entitled to costs. A condemnation of property by the District Court, is conclusive, as to the right of the person claiming the property, in a case where the property was seized by a citizen, other thon an officer of the customs, and the plaintiff did not put in his claim before the District Court. The defendants in this case, seized the property under the instructions of a military officer, during the war.

See Forfeiture, 1.

CORPORATION—See Abatement 3.

COSTS.

PEARL *against* EXECUTORS OF HARRINGTON. *Chittenden*, 1820.

ACT of 1807, allowing $2 term fee relates back to terms in which a suit, then in Court, was pending before the act was passed.

THIS was a writ of error, brought to reverse a judgment of Chittenden County Court, the error assigned was the taxation, in the bill of the costs, of two dollars term fee during the year 1806. Before the act of 1806, the party recovering was entitled to one dollar term fee, seventy-five cents per day for attendance, and travel within this state. 2 Stat. p. 387.

The Statute of 1806, increased the term fee to two dollars, and continued the travel fee for *actual* travel within this State: The act of 1807, 2 Stat. 394, enacts, "That the party recovering, in any civil action, in any County or Supreme Court, shall be entitled to tax in his bill of costs, the sum of two dollars for each term of the Court in which his action shall have been pen-

ding, in lieu of his attendance, and the term fee heretofore allowed," and restricts the travel to two dollars.

By the Court. The act of 1807, must be construed to provide an uniform rule, for the taxation of costs, in all actions in Court at the time the act was passed, and to relate to the time of the commencement of such actions; a party has no vested right in the bill of costs until after recovery in the suit, so that this circumstance does not give the act a retrospective operation, so as to affect a vested right, the cost was legally taxed.

Judgment, there is no error.—See Audita Querela 5. Assumpsit, 3. Bastardy. Condemnation, No. 2. Set-Off, 3.

COVENANT.

CRANE *against* COLLARD. *Chittenden*, 1820.

IN an action on e covenant of seizen, declaration must set forth a legal deed.

THE declaration in this case was: "In a plea of breach of covenant: For that on the 7th day of November, 1809, while the said John Collard was of sound mind, at Burlington aforesaid, the said John Collard, by his certain deed of bargain and sale, sealed with the seal of the said John Collard, and here ready in Court to be shewn, the date whereof is the same day and year last aforesaid, for the consideration of $480, did give, grant, bergain, sell, alien, convey and confirm, to the said Arzah Crane, his heirs and assigns forever, a certain piece of land, containing 20 3-4 acres, and part of lot No. 159, drawn to the original right of Thomas Frost; to have &c. And the said John Collard did, thereby, covenant, for himself, his heirs, &c. to and with the said Arzah Crane, his heirs, &c. among other things, that at, and until the the ensealing the said deed of bargain and sale, he was seized of the premises in fee simple. And the said Arzah says that in fact, &c.

Plea. And now the said John Collard, in Court here by his attorney, comes and says, that he has kept and performed the covenants in his said deed mentioned. Demurrer and Joinder.

For the defendant, it was contended, that the declaration was bad. The instrument, set forth in the declaration is not a legal

conveyance ; the only requisite of a deed, set forth in the declaration, is that it was sealed. The Statute, 1 vol. p. 189, requires a deed to be signed, sealed and witnessed by two witnesses, even to be of any force against grantor. The covenant set forth in the declaration, is connected with the grant and can have no force independent of the deed ; if, then, the instrument fails as a deed, the covenant connected with it must fail: The plaintiff cannot recover on the covenants if the deed which contains them is void, as a deed.

By the Court. The declaration not setting forth a legal deed is insufficient.

Robinson for plaintiff. *Adams* for defendant.

See Pleas and Pleadings, 5.

CREDITOR—See Exrs. and Ad. 9.

DAMAGES—See Ejectment, 5. Evidence, 18. Mortgage, 4. New Trial, 13.

DEBT—See Scire Facias.

DECLARATION—See Pleas and Pleadings, and references under that title.

DEED.

KNAPPEN *against* WOOSTER. *Chittenden*, 1816.

A deed, purporting to be a conveyance in fee, by Baron and Feme, of land of the Feme, and not acknowledged by the Feme separate and apart from her baron, is good under the statute *as against the baron*, and his right is thereby transferred. A note of hand, executed in consideration of such conveyance, is not void, for want of consideration.

See Covenant.

DEPOSITION—See Evidence, 8. Jdugment, 1.

DEPUTATION—See Abatement, 9.

DEPUTY SHERIFF—See Service.

DESCRIPTION—See Trespass, 3, 4.

DIVISION.

No. 1.

DOOLITTLE *against* PECK. *Addison*, 1820.

WHERE in the allotment and survey of a town, the boundary lines of lots No. 28 and 29 excepting the divisional lines between them were actually surveyed out and marked by a surveyor duly appointed for that purpose; but no divisional line was actually run between said lots, the surveyor however, made survey bills describing a divisional line between them, which was duly recorded, and the land contained in the boundaries of both lots fell short of the quantity allotted to both lots. *Held*, that the line must divide the tract equally, although the owner of one lot had taken possession of his full complement of acres to the exclusion of the other.

THIS was an action of Ejectment, for a tract of land in Bridport, as part of lot 28 in the third division, drawn to the original right of Nathan Green. On the trial at July term 1819, it was admitted, that the plaintiff was legally seized of lot No. 28, and that the defendant was likewise seized of lot No. 29, an adjoining lot, and that defendant was in possession of the premises in question. The plaintiff then offered in evidence the following facts viz: That on the original allotment of said town of Bridport, the boundary lines of said lots No. 28 and 29, excepting the divisional line between them, were actually surveyed out and marked, by a surveyor duly appointed for that purpose; but that no divisional line was, by said surveyor, actually run between said lots, that said surveyor made survey bills of both said lots describing a divisional line between them, which bills were duly recorded; that defendant, afterwards, surveyed out and marked said divisional line, agreeable to the survey bills of his lot No. 29, and went into possession accordingly; that the land in question is contained in lot No. 29, the defendant's lot according to the survey bills thereof; that upon a survey of plaintiff's lot, according to the survey bills thereof, it was found,

that the quantity of land allotted to both lots, by the original surveyor, fell short of the number of acres allotted, by the proprietors, to the two lots in question. That in consequence of the defendant's having thus taken possession of his full complement of acres, agreeable to the survey bills of his lot, plaintiff is cut short of his complement of acres, and a part of the land described in the survey bill of his lot, and that the land described in plaintiff's declaration is only a rateable proportion of the land thus covered by both survey bills. To the admission of this evidence, the defendant objected, but his objection was overruled by the Judge: The Judge charged the Jury, that if they found no divisional line was marked, by the original surveyor, between said lots, but that the same was described in survey bills, without an *actual* running thereof; and if they farther found the plaintiff's lot was deficient in quantity, as alledged by him, they would find for the plaintiff to recover his rateable proportion of the land conveyed by both survey bills.

Verdict for plaintiff, and motion for new trial, founded on exceptions to the opinions and charge of the Judge.

In support of the motion, it was contended, that the executing and recording the survey bills, effected a complete severance; otherwise the parties are tenants in common, and so the plaintiff cannot maintain this action.

But by the Court, the decision of the Judge is confirmed: The plaintiff and defendant were not tenants in common, each was seized of his lot in severalty, both lots were surveyed by actual lines into one tract, so that the land included in those bounds, was all the land belonging to both lots, no division line was, in *fact*, run between lots No. 28 and 29; the only question was, where this line ought to run; It must be run so as to divide the lots *equally*.

Motion dismissed and Judgment rendered on the Verdict.

No. 2.

EXECUTORS OF HODGES *against* **PARKER.** *Franklin*, 1820.

WHERE a plaintiff, in Ejectment, shews title to a proprietary right in the town where the land in question lies, and defendant, in his defence, shews, that after the com-

mencement of the action, he purchased under another proprietor, and re-deeded to him before trial, defendant a tthe trial is a *stranger*, and cannot contest the division. Plaintiff is entitled to recover.

THIS was an action of Ejectment, brought to recover possession of lot No. 16, containing 140 acres, in the town of Fairfield, tried at October adjourned term, 1819. Several questions were raised on the trial, but the question, decided at the law term, was as follows: The plantiff had shewn title, to a proprietary right, in the town of Fairfield, but there had been no legal division severing the lot in question to his right.

The defendant then shewed, that Bradley Barlow was the ower of proprietary rights, in the town of Fairfield, before the commencement of this suit. He then read deeds from Bradley Barlow to himself, executed since the commencement of this action, to wit, one dated Jan. 7, 1817, conveying forty acres of the said lot, by metes and bounds, the other dated 1819, conveying the remaining one hundred acres: The plaintiff then offered a deed, which was admitted, dated September 1, 1819, from Joseph Parker to Bradley Barlow, conveying the said hundred acres.

Upon this evidence, the Judge charged the Jury, that the defendant was a *stranger* as it concerned the said hundred acres, and they must find a verdict for the plaintiff for the said hundred acres, he not being obliged to shew a division against a stranger. Verdict for plaintiff to recover said hundred acres. Motion for new trial, founded on exceptions to the opinion of the Judge.

In support of the motion; for plaintiff, it was contended that during the pendency of this suit, Parker became a tenant in common with the plaintiff; here the plaintiff's right of action ended. Parker after thus becoming a tenant in common with plaintiff, gave no right to plaintiff to recover, by selling the land to Barlow or any other person, for a judgment against Parker is conclusive not against him alone; but against any one to whom he had deeded, after the commencement of the suit. 2 Bacon 178.

Contra. A plaintiff in an action of ejectment, having a right to recover at the time of commencing his action, cannot

be defeated by the defendant's purchasing in a defence after the suit brought. 5 Johnson's Rep. 53. 3 Term. Rep. 186. 4 East. 507.

By the Court. The defendant being a stranger at the time of trial, and also, at the time of commencing the action, could not contest the division on the trial. After the evidence of the plaintiff, the burden lay on the defendant, to shew *his* right in the land, either at the time he was sued, or at the time of trial; his voluntarily parting with an interest purchased in the interim, cannot be a subject of complaint on his part. Purchasers under the *plaintiff* would be affected by the Judgment in the same manner as those under the defendant, yet as it is clear law that if the plaintiff parts with his title before trial he cannot recover. So the defendant parting with his interest in this case must have the same effect in his right in the suit.

Motion dismissed and Judgment rendered on verdict.

No. 3.

EXECUTORS OF HODGES *against* **PARKER.** *Franklin*, 1817.

PROPRIETORS, at a meeting under the statute, cannot divide the lands of a town, unequally in quantity: Acquiescence for any length of time will not cure this irregularity.

THIS cause had been tried, at December adjourned term, 1817, and a new trial awarded at the ensuing law term, on the following question:

The plaintiff offered to prove a division of the town by certain records of proceedings of the proprietors, at a meeting not legally warned and holden, and that the division made at said meeting was acquiesced in, by all the proprietors for so great a length of time, that many of the proprietors could hold by the statute of limitations, and insisted that such acquiescence established a good practical division. This evidence the Judge admitted, and charged the Jury that such practical division was good, and that the proprietors might divide their lands unequally in quantity, if fairly, and without fraud.

The Court affirmed the decision of the Judge, except that

the Court decided that the proprietors would not in any case, by proceedings under the statute divide their lands unequally in quantity, and that acquiescence for any length of time would not cure this irregularity. See Partition.

DIVORCE.

BRAINARD *against* **BRAINARD.** *Addison*, 1816.

A bill of divorce will not be granted where the only cause proved, is a total alienation of the affections of one or both of the parties.

DISCHARGE.

No. 1.

ADAMS *against* **JOHNSON.** *Rutland*, 1817.

IN an action on a note of hand not negotiable, a discharge executed by the payee will at law avail the promissor; though he had notice of the transfer and sale of the note prior to obtaining the discharge, or making the payment: A non suit was permitted to be entered after the opinion of the Court was expressed in this case.

No. 2.

BECKWITH *against* **HAYWARD ET AL.** *Caledonia*, 1817.

IN an action on a note of hand, the Court decided that a receipt executed by the plaintiff to the defendant was good and available in defence; although it appeared that the note had been pledged by the plaintiff to a third person to secure the payment of a debt, and although the defendant had notice prior to the execution of the discharge, or payment of the debt.

No. 3.

WETMORE *against* **BLUSH.** *Chittenden*, 1820.

PURCHASER of a note not negotiable will not be protected against a payment to the original payee, or discharge by such payee.

THIS was an action on a promissory note for $125, payable in cattle, to J. P. Wetmore or order. Previous to the time

of payment, Wetmore endorsed the note to Farrar and Coolidge, to whom he was indebted, and authorised them to make use of his name to demand and collect the money, of which the defendant was duly notified: After the note became due, defendant took a release from *Wetmore* on account of the note, and contends he is thereby discharged.

By the Court. The Court do not consider themselves at liberty to depart from the numerous precedents in this State; the law has been long settled by judicial decisions of this Court, that the purchaser of a note not negotiable will not be protected against a payment to the original payee, or a discharge by such payee. A contrary decision would extend the contract beyond the intention of the parties and bind the promissor to a fulfilment different from the terms of the contract.

Judgment for defendant.

DISTRIBUTION.

No. 1.

SAMUEL BUEL *against* ROGER ENOS. *Chittenden*, 1820.

GOODS illegally imported into the District of Vermont, seized by the Inspectors of of the Collector of the District of Vermont, in the district of M. and libelled as seized by the Collector of the District of M. in said district, and condemned, the moiety belongs to the Collector of the District of M.

THIS was an action of Assumpsit for money had and received. Plea non assumpsit, and trial at June term, 1819:

The plaintiff's specification was a moiety of the proceeds of a certain seizure of goods, made at Newbury, in the State of Vermont, while the plaintiff was Collector of the Customs for the District of Vermont, to wit, on the 20th day of August 1812, which goods were libelled at a special term of the District Court of the United States, for the Vermont District, in April, 1813, and were condemned, at the special term of said Court, in June 1813, and of which Abijah Stone was claimant, and which were appraised and delivered on bonds at the sum of $2818,33: There were two other items in the specification which were waved by consent of parties. On the trial of the cause,

before the Court and Jury, it was proved that the plaintiff was Collector for the District of Vermont, from the first day of April, 1811, until the 15th day of February, 1815; that the goods in question were imported from Canada, into the District of Vermont, in August, 1812; that they were pursued by inspectors of the customs appointed by the plaintiff, to Newbury in the State of Vermont, and there, by them, seized on the 20th day of August, A. D. 1812; that they were by said Inspectors reported to the plaintiff, and by the plaintiff delivered to the Marshal of the Vermont District, for safe keeping, on the 16th day of October, 1812; that on the 3d day of April, 1813, the plaintiff delivered to the United States' Attorney, for the Vermont District, a written report of the said seizure, with a request, that the same should be prosecuted to condemnation, which report was dated the 12th day of February, 1815; that the said Attorney considered there could be no condemnation of the goods, if a claim were interposed, unless they were prosecuted by the Collector within whose district the seizure was in fact made, and that he found by conversing with the Collectors of the Districts of Vermont and Memphramagog, that they were agreed in the construction of the law, relative to the boundaries of the District of Memphramagog, to wit, that it contained all that part of the State of Vermont east of the meridian of Lake Memphramagog, which would include the place of seizure; and that the said goods were, therefore, at a special term of the District Court of the United States, holden at Rutland, within and for the Vermont District, on the 5th of April, 1813, libelled by the said Attorney, as seized by the Collector of the District of Memphramagog, within said District; that they were claimed by one Abijah Stone, and that they were duly condemned on that libel, at a special term of said Court, in June, 1813, as forfeited to the United States: It was further proved that the goods had, by order of Court, been delivered to the said Abijah Stone, on bonds, at an appraisal of $2818,33, which amount was paid, by said claimant, to the Clerk of said Court, and by him paid, in June, 1813, to the defendant Col-

lector of the District of Memphramagog, for distribution, and that a moiety of said sum had been demanded by plaintiff of defendant, previous to the commencement of the suit; it appeared that the sum, exclusive of what belonged to the United States, and to the informers, and which had been paid by defendant, amounted, with interest from the time of said demand, to the sum of $841,97.

On this statement of facts the Judge charged the Jury to find a verdict for the plaintiff, and the Jury returned a verdict accordingly. Motion for new trial, founded on exceptions to the opinion and charge of the Judge.

Opinion of the Court. This case is one most peculiarly proper for the decision of the Courts of the United States; a dispute between two officers of the United States, concerning the construction of an act of the United States, distributing fines and forfeitures, and a question which concerns the officers of the government generally, throughout the United States. As the judgment of this Court may be reviewed by the Supreme Court of the United States, the Court consider their decision to be of little importance, and the question foreign to their proper jurisdiction; an opinion has been, therefore, formed, without taking that time for consideration, which the difficulty of the subject requires.

1. The Court consider the place of seizure to be in the District of Memphramagog.

2. The Court have not attempted to enquire into the object of the Act of Congress, in distributing the fines and forfeitures, incurred by illegal importations of goods; whether it is to excite to individual vigilance, or as a general inducement to the officers, is immaterial: The opinion of the Court is founded on the 91st section of the Act. In this section Congress have professed to distribute all fines and forfeitures incurred under this Act; that the word forfeitures includes seizures, is manifest, from the preceding section; the avails of these forfeitures are to be paid to the Collector, who made the seizure, to be by him *distributed* according to law; the 91st section is the law

referred to, and by this section, one moiety is to be paid to the Collector of the collection district where the forfeiture was *incurred.* In this case the forfeiture was incurred in the District of Vermont. This distribution would excite to a general vigilance, for if the Collector of Vermont District is entitled to a moiety of the forfeitures incurred in his District, but the seizures made in the District of Memphragog, he is also reciprocally answerable for seizures made in his district, but the forfeiture incurred in another District.

Judgment, that defendant take nothing by his motion, and Judgment rendered on verdict.

No. 2.

BUEL *against* VAN NESS. *Chittenden*, 1815.

THE Collector at the time the money is paid to the proper officer of the District Court, is entitled to the penalty, in exclusion of the Collector, who was such at the time the property was seized.

THIS decision was reversed in the Supreme Court of the United States.

No. 3.

JERUSHA ROBINSON Guardian to JOHN S. ROBINSON Ap't.
against
MOSES ROBINSON and others. *Bennington*, 1818.

A receipt executed by a son to his father, for a certain sum, in full of his share, as heir to his father's estate, held to be only evidence of an advancement to the amount therein mentioned, and not to bar the son of his share as heir.

The expences of a college education a proper item to be charged as an advancement, if the father chooses so to charge it.

THIS case was an appeal from the decree of the Judge of Probate, rendered May 8, 1815: The exceptions to the decree were as follows: "That whereas the said Court of Probate, on the day and year last aforesaid, did, among other things, consider, adjudge and decree, that Moses Robinson, son of the said Moses Robinson, deceased, was entitled to one sixth part of the estate of said Moses Robinson, deceased, of which he

died possessed; when in truth and fact, the said Moses Robinson, the younger, did, on the 7th day of July, A. D. 1786, by writing, under his hand, made, executed, and delivered by him, the said Moses, the younger, to him, the said Moses, deceased, then in full life, the date whereof is the same day and year last aforesaid, in and by which said writing, the said Moses, the younger, for and in consideration of the sum of five hundred pounds lawful money, promised and agreed to and with his said father, that the said five hundred pounds should be in full of all his father's estate, which he, the said father, should die possessed of, and that the same, whatever it might be, should be for the sole benefit of the other children of his said father." The appellant also excepts to the allowance of $2430,55, as an advancement to Nathan Robinson, father of said John S. Robinson, in which was included an item for Colledge education, charged by the deceased, but not carried out at any price by him, but estimated by the Judge of Probate, at $800.

Copy of the writing set forth in the exceptions:

"July 7, 1786. Received of my honoured father, five hundred pounds, in a farm together with one yoke of oxen and a mare, which is to be in full of my father's estate; provided that I am not called to be at any trouble about selling said estate.

"MOSES ROBINSON, Jun."

In support of the exceptions, Robinson, for appellant, contended,

1, That maintenance, money, &c. at the University, or for education, shall not be deemed a part of a child's advancement. 2 Bac. 254. 3 Bac. 76. Toller 379. 2 P. Wm. 449. Levin p. 3, s. 18.

2. The receipt executed by Moses Robinson to his father, in his life time, is a complete bar to any other or farther claim, both in law and equity. 3 Mass. Rep. 143. Quarles v. Quarles, 4 Mass. Rep. 680.

It *further* appears from the general nature of contracts.

a...

by him *distri...*

A contract for a valuable consideration, for marriage, &c. or for other reciprocal contract, can never be impeached, at law, and, if the consideration be of sufficient adequate value, can never be set aside in equity. Com. on Con. 8, note 2. Bla. Com. 444.

If the contract be fair, in its *creation*, it shall not be affected by a subsequent event, which has thrown the advantage greatly or wholly on one side. 1 Bac. 109.

Solemn conveyances, releases, and agreements, are not slightly to be set aside; equity will not, therefore, avoid a reasonable and fair agreement, though founded on mistake, or the party were intoxicated, in person, or some paternal authority were exercised, and some benefit to accrue to the father, under it. 1 Bac. 111, note.

A contract or agreement must be unlawful, at the time of making, otherwise, it cannot be set aside, for it is said, the law knows of no contract, but what is good, or bad, at the time of making, it cannot be one or the other, according to a subsequent contingency. 1 Com. on Con. 31.

If George Robinson had died worth nothing, or worth less than he was, at the time of the execution of the release, and the other heirs claimed, that Moses should bring what he had received, into hotchpot, as being more than his share; would it not then be contended that the contract between Moses and his father, was valid?

It is certain the property was not given to Moses as an advancement, unless it was an advancement given and accepted expressly *as such in full*.

The custom of the city of London, is the remains of the common law, and was originally the common law over the whole realm, so that the decisions, under that custom, are the decisions as at common law. 2 Bac. 250. 2 Bl. Com. 490, 516.

Where a child, though an only child, has been advanced, and the amount of advancement does not appear, he shall be deemed fully advanced. 1 Atk. 407.

It may be asked, what becomes of the remainder? The child takes it as next of kin to the deceased, but if there had been any other in equal degree, he had been barred:

If there be a devise of a term for years to A. for life, remainder to B, B may release his right to A, and such release shall extinguish his right, though it was objected that B had only a possibility, at the time of the release made. Lampet case 10. Co. 47. 5 Bac. 705.

But B could not assign his right to a stranger, it being a mere possibility. Lampet's case, 1 Bac. 249. 5 Bac. 705.

In every case where he to whom the release is made, hath the freehold in deed or in law, at the time of the release, then the release is good. 2 Co. Inst. Sec. 447.

Contra. Skinner for appellees.

By the Statute, directing the descent and distribution of *intestate* estates, *all* the children are entitled, excepting such as are excluded by the 27th Section, by reason of advancement.

The 35th Section directs what shall be received as *evidence* of such advancement; it is not contended, but that the receipt, given by M. Robinson, Jun. to M. Robinson. Sen. is such *memorandum* as the Statute contemplates, and is to be considered as advancement:—If the father is disposed to cut off a child from the inheritance, he can do it, only by *deed* or *will*.

In England, the father dying intestate, a child advanced, can claim nothing farther, under the Statute of Charles, unless he brings such advancement into hotchpot. 2 Bac. Tit. Exrs. and Adm. 3 Bac. 72, 76.

It has been said, that as Moses Robinson, the younger, would not be liable to refund to the other heirs, in case the father's property had diminished, he ought to claim no more, although it has increased; this surely can have no weight, as every case of advancement, contemplated by the Statute, is liable to the same objection.

The instrument which, the appellant contends, ought to exclude Moses Robinson from a share, if it is not considered, as

a *memorandum*, operating by way of advancement, must be considered either,

1. A release, or

2. A contract, made with the intestate, not to claim that portion of the estate, to which the Son is entitled, under the Statute, and for a breach of which, he is liable to the executor or administrater in action—or

3. A contract which a Court of Chancery would enforce against him.

It is believed, it is *that* which is unknown to, and not recognized, by the law, unless it be considered as above explained—

1. The instrument is not good as a *release*, not having the legal requisites to constitute a good *release* of goods or chattels, and more especially of an estate in lands: It must be, by *deed*, and no case is to be found where a Seal is dispensed with. 4 Bac. 265. 5 Bac. 682. Shep. T. 323. 1 vol. Vt. Stat. 188–9.

2. There was no such interest, in Moses Robinson, Jun. as could be released by him. A release is where a man quits, or renounces, that which he before had. 6 Com. D. 183. Shep. T. 320–3.

A release does not extend to a future right, as by an heir, the father living. 6 Com. D. 187. 4 Bac. 283. 5 Bac. 704. Co. Lit. 265. 10 Co. 51. Shep. T. 321.

A mere *possibility* cannot be released; a release supposes a *right* of some sort in being. 4 Bac. 284. 5 Bac. 704–5. 5 Jac. L. D. 433.

A Son cannot bargain and sell or release the inheritance. Bac. 275. Co. Lit. 265. 4 Bac. 283.

It is said at *law*, if he releases with warranty, he is barred by rebutter, Co. Lit. 265, but chancery will relieve in all such cases. 2 Powell on contracts 184–5–6.

It is confidently believed that no case can be found in which an heir can convey his expectancy; the very nature of the case forbids it; there is no *right*, no *interest* in the child.

The Statute that gives two shares to a Son, if the father dies to-day, may, to-morrow, be repealed or altered, and he have but one, or none, or the whole.

It has been contended, in this case, that the custom of London would give effect to the receipt so as to deprive Moses Robinson of his share.

It is not believed, that the Court will consider, that the custom of London, or any other local custom, will govern in the decision; the custom of London is excepted, out of the Statute of Charles, called the Statute of Distribution. Our Statute of Distribution has not excepted the custom of London, and as no such doctrine was ever held, or question made, under the custom of London, it could not have been expected, that any such would have been attempted under *our* Statute; if the custom of London is to prevail, it will be necessary to examine the whole, for which see 2 Sal. 426–7. 4 Jac. L. D. 194–5–6. 4 Com. Dig. 287–8–9. 2 Bac. 245.

It is contended, however, that was the Court to be governed in their decision, by the custom of London, the instrument here shewn, could not exclude the claim of the appellee.

1. Because the custom applies *only* to *personal* and not to *real* estate. 1 Eq. cases 150. 2 Co. 593. 1 Bac. 683. 2 Bac. 294. 4 Cam. 284.

Real estate does not constitute an advancement. 4 Com. 286. 1 Bac. 686.

2. Because the cases produced, are all cases of releases, that is by *deed*.

3. Because such release is void at law. 4 Bac. 284. 5 Bac. 705. Toller 399. Equity considers it a waiver of the orphanage share, and that only under restrictions.

It would seem, that in order to make such release valid, it must have been for advancement, for trade, or for marriage. 4 Com. D. 290, 2 Atk. 160. 2 Bacon 152, note.

4. Because the release can never, in equity, operate upon any thing, but the *orphanage* part, not on the dead man's

share; or that which goes in a course of distribution under the Statute. Lex. Test, 426.

The appellant being a grand child, and who sets up the custom of London, to exclude the appellee, would, by that custom, be himself excluded. 1 Bac. 685. 2 Salk. 426. 4 Com. 286. 2 Bac. 251.

The Court decided, that the Son has no interest in his father's estate, on which, a release executed during the life of the parent, can operate; that the custom of London cannot apply in this State, as the child, according to that custom, was entitled to a share, of which the parent could not deprive him by *will*, consequently he had a *right*, on which a release could operate; but, in this State, no such *right* exists, and the instrument under consideration must be inoperative; the decree of the Court of Probate, adjudging one sixth part of the estate of the deceased, to Moses Robinson, was affirmed, but the decree charging Nathan Robinson with $800, as an advancement, for college education, was reversed, the Court being of opinion, that the deceased did not intend it as an advancement, from the manner of its being charged. Judges Chace and Brayton were of opinion that college education was a proper item to be charged as an advancement, if the father thought proper so to charge it. Judge Doolittle dissenting, both as to the right of appellee to a share of the estate and the propriety of charging college education as advancement.

E.

EASEMENT—See Prescription 1, 2, 3. New Trial 7.

EJECTMENT.

No. 1.

SELECT MEN OF COLCHESTER *against* HILL. *Chittenden*, 1815.

THE *Select men* cannot maintain an action of Ejectment.

to recover lands granted to the Society for the propagation of the Gospel in foreign parts. Held bad on demurrer.

No. 2.

ROOD *against* **WILLARD.** *Windsor*, **1816.**

THE Statute granting to the towns, the Society lots, so called, does not affect the legal estate, to wit, the estate of the trustee, where the estate was granted to A B, in trust for the Society. The Statute only vests the uses in the towns. In an action of Ejectment, for the Society lots in Hartland, the plaintiff offered to shew in evidence, that a decree was made in Chancery, against him, in favor of the Town, that he should attorn to the town, and pay the back rents, and that he had attorned to the town, and paid the back rents.

It was held to be proper evidence to entitle the plaintiff to recover against a stranger.

No. 3.

ANONYMOUS. *Caledonia*, **1816.**

ALIAS execution, issued after more than a year had elapsed from the return of a prior execution, and levied on land. This evidence offered to the Jury to shew title in the plaintiff, in an action of ejectment.

Decided, that the proceedings are irregular, and do not shew title in the plaintiff.

No. 4.

SELECT MEN OF ROCKINGHAM *against* **HUNT ET AL.** *Windsor*, **1817.**

IN an action of ejectment, where it appeared the defendant was in possession of the premises under a *lease*, from the plaintiff, and the cause of action was, the non payment of

rent; the defendants cannot come in and be entitled to a time to redeem i. e. pay the rent, &c. under the 76th Section of the Judicary Act.

No. 5.

ROOD *against* **WILLARD.** *Windsor*, 1817.

A Lease made before the Statute of 1807, by a person out of possession, (and others in claiming adverse) to a third person, is good to pass the lessor's right: Actual possession, by the plaintiff is not necessary to maintain ejectment, i. e. it is not necessary he should *ever* have been actually possessed.

The Court will not set aside a verdict because the plaintiff declared for and recovered a fee; though his proof shewed an estate of 999 years.

N. B. This was not a case of tenant against landlord, but against strangers.

In ejectment, the declaration is good against the defendants *jointly;* although it shall appear in evidence that the possessions and tresspasses of the defendants, were several and distinct, upon the *same* lot of land, described in the declaration. If the the defendants intend to take advantage of their *several* possessions they must *each* disclaim as to the remaider.

Joint damages are to be assessed by the Jury, unless the several defendants *disclaim severally.*

N. B. In this case the defendants plead not guilty *severally,* but no one disclaimed and they were proved to be in possession.

No. 6.

EVARTS *against* **DUNTON ET AL.** *Franklin*, 1820.

A plaintiff in ejectment, who declares for an interest in *severalty* may *recover* by shewing the interest or share of a tenant, in common with the defendant, and on actual eviction by defendant.

If the defendant has been guilty of an actual ouster, the burden of proof lies on him to shew the *amount* of his interest or share in the land; if he neglects this on the trial, the Court will not therefore, grant a new trial to enable him to obtain his share.

THIS was an action of ejectment, in common form, brought

to recover lot No. 35, in the town of Georgia. On the trial, at June term, 1819, several objections were made to deeds, offered on both sides, but the principal question reserved, arose from the charge of the Judge to the Jury.

It appeared, that the plaintiff had shewn a title to the proprietary right of John March, and the defendants had shewn a title to the proprietary right of the first settled minister.

From the evidence adduced on the trial, these questions arose:

1. Whether the lot in question had been severed to the plaintiff's right.

2. Whether it had been severed to the defendant's right.

3. If the lot had not been severed to either right, whether the plaintiff had not been in actual peaceable possession of the lot, and been forcibly expelled from such possession, by the defendants.

The Judge charged the Jury, among other things, that if the plaintiff had no title in *severalty* to the lot in question, and was a proprietor, in common with the defendants, of the town of Georgia; yet if he was in actual peaceable possession of the lot, or any part, claiming the whole, and the defendants having no title, in severalty, or better possession, expelled the plaintiff from his possession, the plaintiff might recover, *on this declaration.*

Verdict for the plaintiff, for the premises demanded.

Motion for new trial, founded on exceptions to the opinions and charge of the Judge.

In support of the motion it was contended—That the plaintiff had declared for the whole lot No. 35, and a judgment in this suit vests in the plaintiff, as against the defendants, the title to the whole lot: One tenant in common, can maintain ejectment against his co-tenant, for an actual ouster, but in such case, he must declare for his undivided share. Runnington on Ejectment 191–2. 12 Mod. 567.

Opinion of the Court. It has been settled in this State, that

in our action of ejectment, a plaintiff may recover less than what he deceares for :

1. He may sue for a whole lot, and recover a less *quantity* of land.

2. He may declare for an estate in fee, and recover agaist a *stranger*, a term of years. See Ante, No. 5.

3. The question, in this case, is, whether he can declare for an interest in *severalty*, and recover the *interest* or *share* of a tenant in common, against his co-tenant, who has forcibly evicted him.

The Court are of opinion, that the plaintiff may declare for the whole in *severelty*, and the verdict may be returned for the plaintiff to recover such *interest* or *share*, as is conformable to his evidence. See 1 Burr. 326. Chapin v. Scott, Chipman's Rep. 33.

In this case, the verdict was for the whole premises demanded ; but the Court will not grant a new trial, for it appears from the case, that on the trial, the defendants did not claim that the verdict should except any part of the land, and that the defendants did not furnish any evidence, by which the Jury could ascertain the *quantity* of interest, their proprietary share was entitled to : If they had been guilty of an actual ouster, the burden of proof lay on them, to shew *their right*, and the *amount* of their interest.

The defendants did not request the Judge to instruct the Jury, on the subject of returning a verdict, for an undivided share, but only raised the question, whether the plaintiff could recover *at all, on this declaration*.

Finally—The real question, in dispute, was, whether the lot in question, had been severed to the right, either of the plaintiff, or of the defendants, and the Court see no reason why this question should be again litigated.

Motion dismissed, and Judgment rendered on verdict.

No. 7.

EVARTS *against* DUNTON ET AL. *Franklin*, 1817.

BEFORE division of a town, by draft, the proprietors may, under the Statute, vote to a *public right*, the lot, on which a settler is placed, under that right

Plaintiff in ejectment, against several, must prove *all* the defendants in possession, in order to recover against *all*.

THIS action was tried at June term, 1817. Plea—severally not guilty. On the trial the plaintiff claimed title to said lot, under the right of Seth Denio, one of the original proprietors of said town, and also under a possession taken of said lot, in 1789 or '90, and a survey bill made thereof, and recorded in 1792, and holding the possession thereof until the disseisen complained of in the writ; which evidence was admitted.

The defendants claim title to said lot, under the Rev. Publius V. Booge, as belonging to the right of the first settled minister, in said town, and also by fifteen years possession in themselves and those under whom they claim. Plaintiff admits there was one right reserved in the charter of said town, for the first settled minister. Defendants offer to prove by the proprietors records, that on the 6th day of April, 1806, the proprietors voted the lot in question, to the ministerial right, Publius V. Booge, settler; the plaintiff admits the town was legally surveyed, and the proprietors' meeting legally warned, for dividing the town, and voting lots to settlers; but, contended that the proprietors could not vote a lot to a settler under the ministerial right.

Decided by the Judge—That the public rights in a town could be designated by draft only, that until such division was made, the Select men of the town had no authority *as such*, to designate, take possession of, or lease out any portion of the land, in their town, as of, and belonging to, the ministerial right; and the evidence was rejected.

Defendants offered to prove, that the Select men of Georgia, in 1790, took possession of said lot, occupied and improved the same, as a lot belonging to the first settled minister in said town, until 1804, and then delivered the same to the said Booge.

This was objected to by the plaintiff, no division of the towns at that time, having been actually made, by the proprietors.

The Judge admitted it so far only as to shew that the *plaintiff* had not made or maintained a possession, on said lot; but rejected it as improper, to shew any right in defendants.

The defendants offered to shew, that the Select men of said town, in 1799, took possession of said lot, occupied and improved the same, until 1804, and then delivered possession thereof to said Booge; objected to, and rejected by the Jugde.

The defendants offered to prove, that in 1802, the said Booge was legally settled a minister in said Georgia, and the first settled minister in said town; objected to, and rejected by the Judge.

No evidence was offered to shew more than two of the defendants in possession, (there were five defendants.)

The Judge charged the Jury, that, as the pleadings stood, if they found for the plaintiff, they might find all the defendants guilty.

Verdict for plaintiff, and motion for new trial, founded on exceptions to the opinions and charge of the Judge.

Opinion of the Court:

1. The defendants ought to have been permitted to shew, that the Select men had placed a settler on the lot in question, and that the same was voted to the ministerial right, according to the provisions of the Statute. 2 vol. p. 316.

2. The Judge ought to have charged the Jury, that the plaintiff could recover against those defendants *only* who were proved to be in possession.

See Mortgage 4. Judgment 2.

ENDORSEE—See Promissory Note 4. Exrs. and Adm. 2. Notice 2.

ERROR.

No. 1.

ANONYMOUS. *Washington*, 1816.

JUDGMENT of Court, for a sum exceeding the sum total in the ad damnum, is error.

No. 2.

SLADE *against* DAY. *Franklin*, 1816.

THE decision of a former Court, that there is error in the judgment, &c. and the same be reversed, and set aside, is conclusive upon the Court, at a subsequent term, to which the cause is continued, for the court to render such judgment as the County Court ought to have rendered.

No. 3.

HATHAWAY *against* BURTON. *Franklin*, 1816.

A rule entered into by the parties, that the cause shall be tried by the Court, may be enforced by the Court; and if the party refuses to put the issue to the Court, in pleading, it will not be error in the Court, to render judgment for want of a plea.

No. 4.

ANDREW *against* CONRO. *Franklin*, 1816.

IT appeared that the declaration complained of an assault and battery on personal property; there was a plea of not guilty, to the assault and battery, and issue closed to the Jury thereon; there was a farther plea in bar, justifying the trespass upon the property, to which there was a replication of de injura, &c. concluded to the country, to this there was a special demurrer and joinder.

The record shewed no trial of the issue of fact and no other judgment, except in these words: "Damages $53; Cost $37,58;

agreed to.* A plea in abatement to the writ of error, alledging that there was no *judgment*. Replication: There was a judgment and execution for the said sum of $53 damages, $37,58 costs. Demurrer.

The Court decided. There was error in the record and judgment of the County Court, and that the same be set aside, &c. and the cause continued for this Court to render such judgment as the County Court ought to have rendered.

No. 5.

PURDY *against* **WALKER.** *Bennington*, 1817.

THE Court will not, on motion, dismiss a petition for a new trial, in a case where the judgment was against the plaintiff in error, who alledges, as cause for new trial, that the Court were mistaken in the law, and where the authorities cited in the petition to shew that the Court had mistaken the law, are all strong.

* NOTE. At the next term of the Court in Bennington County, the Court decided to dismiss the petition without a hearing on the merits. Reporter.

See Abatement 13. Audita Querela 1.

ESTOPPEL—See Judgment 1. Error 2.

ESCAPE.

No. 1.

LEONARD *against* **HOIT.** *Addison*, 1819.

A prisoner confined on execution, founded on trespass, cannot be admitted to the liberties of the prison.

CASE stated. The plaintiff had recovered judgment against one E. W. Judd, in an action of *trespass vi et armis*, for $148,33 and took out execution; upon this execution, the said Judd was committed to the prison of Addison County, of which defendant was keeper; the nature of the action was duly certified in the execution. The defendant permitted Judd to go at large, within the liberties of the prison.

Question. Is defendant chargeable for an escape?

Phelps, for the plaintiff, contended—That the right of admission to the liberties of the prison, is a right created by Statute, and without statutory provision could neither be claimed by the prisoner, or granted by the Sheriff; that our Statute does not extend this right to cases of commitment for torts. 1 Stat. 283.

Contra. Chipman and *Edmond*—That in all cases where there are rules or liberties to a prison, there can be no escape, where the prisoner, on execution, remains within those rules and limits. Our *liberties* are precisely similar to the *rules* of the public prisons in England, as the Marshalsea, Fleet, and King's Bench prisons. In public prisons, it is a rule of common law, that liberties are to be set out. If the description of persons, committed on execution, not founded on contract, cannot be admitted to the liberties, our system is imperfect. The law is, that in case of prisoners for debt, the Sheriff is *compelled* to admit *them* to the liberties of the prison upon bonds; but in case of prisoners confined on execution, founded on trespasses, &c. it is *optional* with the Sheriff, to admit them to the liberties or not; he can give them that privilege and recommit them as often as he pleases; they are entirely under the control of the Sheriff.

Phelps, in reply—The origin of the *rules*, in the public prisons in England, was, that the prisoners became so numerous, that no one building could contain them, and an *Act* was passed authorising the Court to make rules, setting out the limits of the prison, and declaring such limits, so set out, to be the same as the original prison, and prisoners were located in those limits, at the discretion of the *Court*, who could give them a greater, or less degree of liberty.

By the Court. The departure from the prison, set forth in the case stated, is an escape; a prisoner cannot be admitted to the liberties of the prison, except in the cases where the privilege is *expressly* given by Statute.

Judgment, that defendant is guilty.

No. 2.

WILLARD *against* HATHAWAY ET AL. *Addison*, 1815.

WHERE there are limits, of a certain extent, assigned by the County Court, for a Jail-yard, at the time the prisoner was admitted to the liberties, and the limits were afterwards enlarged, and then again contracted, under the Statute of 1813, the prisoner was held to be guilty of an escape, for not returning and continuing in the last mentioned limits.

See Wait v. Dana. Bail Bond 8.

EVIDENCE.

No. 1.

REYNOLDS *against* SCOTT. *Franklin*, 1815.

A penal bond to re-convey lands is a mortgage; but it may be discharged and satisfied, as any other bond, and the proof of its satisfaction, may be made by *parol* evidence.

No. 2.

FISHER *against* BEKKER. *Rutland*, 1816.

UNDER the Statute authorising commissioners to lay out turnpike roads, and to set over old road, if old road, in the opinion of the Select men, may be discontinued; it was held, if it does not appear from the doings of commissioners, as *recorded*, or from some official act of Select men, in *writing*, that the Select men had expressed their opinion; the setting over was irregular and void. That the opinion of the Select men could not be shewn by *parol*.

No. 3.

SESSIONS *against* GILBERT. *Rutland*, 1816.

A general receipt in full of all demands, cannot be explained

or impeached, by *parol testimony*; mistake or fraud would be cause for admitting parol testimony to do away its effects.

No. 4.

ANONYMOUS. *Washington*, 1816.

A note, executed in the time of the Stamp Act, and not stamped, cannot be given in evidence to the Jury, without being stamped. The penalty enacting this disability, is saved in the proviso of the law repealing the Stamp Act. Quere de hoc.

After judgment it was discovered that the Stamp Act was not a perpetual Statute.

No. 5.

TREASURER OF ST. ALBANS *against* GIBBS. *Franklin*, 1816.

A town record is not evidence to shew the formation of a Society, under the 2d Section of the Act for the support of the Gospel, nor is it competent for the Town Clerk *as such*, to certify the record of the warning, holding, and organization of the same. A Town Treasurer, as such, cannot hold real estate in trust.

No. 6.

PHELPS *against* MOTT. *Franklin*, 1816.

IN an action, for money had and received, it is legal evidence for the plaintiff to shew a draft or order given by him to defendant on a third person.

No. 7.

STATE *against* ROWLEY. *Chittenden*, 1816.

AN Indictment for forgery, alledging the word *birch* to have been altered *batch*, by erasing the letters irc, and inserting the

letters atc, is well supported by evidence only as to the erasing of ir and inserting at, without regard to the letter c.

No. 8.

PETTIBONE *against* ROSE. *Bennington*, 1817.

DECLARATIONS of persons deceased, in relation to the ancient course of water, may be given in evidence. A deposition which has no certificate of its having been opened in Court, having been read on former a trial, without objections will not be rejected for want of the certificate.

No. 9.

WAIT *against* FAIRBANKS. *Windham*, 1817.

A note of the following tenor, viz :

"Wardsboro', Jan. 9, 1813.

"For value received of Parly Fairbanks, I promise to pay him, or his order, the sum of one hundred and ninety dollars of *good custom cow-hide* boots, at four dollars per pair; said boots to be delivered at my shop in Wardsboro', in two years from the first day of January instant, one half of said boots to be horse-hide legs, and one half of the other to be good kip-skin legs ;"—is ambiguous, and parol proof is admissible to shew the agreement and understanding of the parties, in relation to the kind, quality, and worth of the boots intended ; there being no definite meaning attached to the words, "good custom cow-hide," &c.

No. 10.

KNIGHT *against* STEVENS. *Windham*, 1817.

IN this cause the Court set aside the judgment of the County Court, it appearing from the bill of exceptions that the County Court admitted testimony of the declarations of persons interested, and a variety of hearsay testimony.

No. 11.

STATE *against* PROSPER LAWRENCE. *Windsor*, 1817.

OTHER testimony than the President and Cashier is admitted, to prove a bank note counterfeit; other testimony than such as have seen the President or Cashier write, or are acquainted with their hand writing, (except from seeing the bills in circulation,) is admissible, to prove a bill counterfeit.

No. 12.

BATES *against* MARTIN. *Orange*, 1817.

EVIDENCE of express warranty, alone, will not support a declaration for *deceit* or *fraud*, in the sale of a horse.

No. 13.

BURTON *against* FERRIS. *Franklin*, 1820.

ACTION on book against A and B, as partners, non est as to A, B pleads in bar that he was not a partner with A; verdict for plaintiff. On the trial before the auditor the verdict is no evidence that the articles charged in plaintiff's book were delivered, on account of the partnership concern. The parties may be examined as to the fact, on *whose* account the articles were delivered.

THIS was an action on book, in favor of the plaintiff against Andrew Bostwick and Jonathan Ferris; the writ was returned *non est*, as to Bostwick. Ferris after having oyer of plaintiff's book, pleaded in bar, that he was not partner with Bostwick, during the time embraced in the plaintiff's account. Issue of fact, and verdict for plaintiff. George Robinson, Esq. was appointed auditor, who reported to this Court a balance in favor of the plaintiff of $5425, 41. Exceptions were taken to the report, which were decided as follows:

1. The auditor decided that the defendant as partner was *prima facie* accountable for all those things, contained in plaintiff's account, as it appeared on oyer, which were proper subjects of book charge. The Court are of opinion this decision was incorrect; the verdict was conclusive *only* as to the fact

of partnership between Bostwick and Ferris, but furnished no evidence, that any of the articles specified in oyer, were delivered to Bostwick on *account* of the *partnership* concern.

2. The auditor refused to permit the parties to be examined as to the fact on *whose* account the articles were delivered. This was also incorrect; the parties were competent witnesses each for himself, and each for the other, and ought to have been permitted to testify as to the quantity, quality, and delivery, of the articles, and also as to their vlaue, and on *whose* account they were delivered, whether on the *partnership* or *individual* account. Report set aside, and a new trial before auditor granted.

NOTE. This cause was tried and decided by one Judge, (Doolittle.)

No. 14.

DOWNS *against* WEBSTER. *Franklin*, 1820.

WHERE a note, given for goods sold, was written for $200, *parol* evidence is not admissible to shew a mistake in the sum, merely by proving, that the price of the goods sold, was different from that expressed in the note.

ACTION on note, as follows:

"Georgia, July 17, 1811.

"By the first day of October, 1817, for value received, I promise to pay Bushnall B. Downs, or order, two hundred dollars worth of good neat saleable cattle, (bulls and stags excepted,) and none over eight years old; said cattle to be delivered at the dwelling house of Samuel Webster, in Fairfax, with interest until paid, as witness my hand.

"SAMUEL WEBSTER.

"George Steele."

Plea, non assumpsit. On the trial, at September adjourned term, A. D. 1818, the defendant offered to give in evidence, by oral testimony; that on the 17th day of July, A. D. 1811, the day of the date of said note, at Georgia aforesaid, the plaintiff sold to the defendant, a quantity of goods, at the price of eleven hundred dollars; that then and there, the defendant executed to the plaintiff, four promissory notes, for the sum of two

hundred dollars each, and one for the sum of one hundred dollars; that four of said notes, for the sum of two hundred dollars each, had been paid by defendant, and were ready to be shewn in Court, and that the note in question was given on account of the contract and sale of the goods aforesaid—which evidence was rejected by the Judge.

The defendant further offered to give in evidence, that the note had been mutilated, when in possession of the plaintiff, so that figures on the margin of said note, designating the amount of said note, had been cut off. The only evidence offered of this fact, was the appearance of the note itself, which evidence was rejected by the Judge.

Verdict for plaintiff.

Motion for new trial, on exception to the opinion of the Judge.

In support of the motion defendant contended, that parol evidence ought to have been admitted, by the Judge, to shew that the note ought to have been written for one hundred dollars; there are exceptions to the rule that parol evidence cannot be admitted to contradict, add to, or vary, the terms of a written instrument. 2 Term. Rep. 366. 2 Johnson 378. 3 Johnson 319. 5 Johnson 68. 8 Johnson 389. 6 Mass. R. 340. 6 Cranch 388. 3 Cranch 311. 2 Dall. 171. 1 Tyler 382.

2. That the note being mutilated by the plaintiff's cutting off the figures on the margin, is evidence of fraud.

Contra. That parol evidence is not admissible to shew that the note was given, by mistake, for $200 instead of $100, or in any way to vary or alter the terms of the note, unless it can be made to appear that the plaintiff was guilty of a fraud in obtaining the execution of the note. 2 Bla. R. 1249. 8 T. Rep. 379. Peak's Ev. 115.

By the Court. In this case the defendant offered to prove that the price of the goods, as agreed upon, was different from that expressed in the notes; he did not offer any evidence of fraud or mistake other than is inferred from the price of the goods.

The Court consider that when the signer of a note is perfectly capable of transacting business of this kind, and alledges no fraud, it would be dangerous to permit the amount of obligation, or notes, given for property sold, to be controlled by oral testimony, that the bargain, as to the price, was, according to the recollection of witnesses, different from that expressed in the written contract. Such evidence would set afloat all written securities, and the amount of a note would depend, not upon the sum expressed in the note itself, but upon the recollection of by-standers, as to the price of the property sold.

2. From the appearance of the note there was no mutilation, proper for the Jury to take into consideration. No evidence was offered to prove there ever were *any* figures on the margin of the note, or that the note was ever different from what it appeared to be on trial.

Motion dismissed. New trial not granted.

Judgment rendered on verdict, with additional costs.

No. 15.

HALL, ADMINISTRATOR OF SHIRTLIFF *against* MOTT.

Franklin, 1820.

WHERE, upon a written contract, this endorsement is made, "by agreement of parties this contract is satisfied," parol evidence is admissible to prove the consideration of the endorsement.

2. In case of a special written contract, and money advanced upon it, and the promisee claims damages, both on the ground of the non-performance, and of the money advanced, the parties may submit the special damages to arbitration, distinct from the money advanced.

3. After an award on such submission, the promisee may maintain an action for the money advanced alone.

THIS was an action of assumpsit, for money had and received, and money paid. Plea, non assumpsit.

The plaintiff, in support of his declaration, offered a witness to prove that Alexander Scott left with the witness, as his attorney, certain receipts of the tenor following:

"Received, Montreal, February 5, 1810, from Mr. Oliver Shirtliff, sixty-eight pounds one shilling and nine pence, on

account of a contract of ten thousand Staves, to be delivered in Quebec, &c. Signed,

"JOSEPH MOTT."

"*Ormestown, March* 21, 1810.

"Received of *Oliver Shirtliff*, on a contract between said Shirtliff and myself, fifty pounds, Halifax currency, which I, on my part, am to fulfil according to the tenor of said contract.

"JOSEPH MOTT."

And that the receipts had been lost; objection by defendant, and objection over-ruled by the Judge. Witness proved the above facts; and plaintiff farther proved that Mott had acknowledged that he executed receipts of that tenor to Shirtliff.

The defendant then produced an agreement, made between *Mott & Shirtliff*, of the following tenor; (the agreement was to deliver a quantity of lumber at Quebec, in the month of June, 1810, at a stipulated price;) on which agreemnnt was endorsed as follows:

"*Alburgh, Sept.* 20, 1810.

"By agreement of parties, this contract is satisfied.

"Signed,

"JOSEPH MOTT,
"OLIVER SHIRTLIFF."

This agreement and endorsement was admitted by the plaintiff; and it was also admitted, that the money, advanced by Shirtliff to Mott, as specified in said receipts, was advanced on said contract.

The plaintiff then offered to prove, by parol, that Shirtliff had heretofore commenced two actions against said Mott, one on the contract, to recover damages of Mott, for the non-performance of the contract; the other to recover back the money advanced, mentioned in said receipts. That Shirtliff and Mott, pending those actions, agreed to submit to arbitrators the action commenced to recover damages for the non-performance of the contract, and did submit, and the arbitrators made an award, that said Mott should pay to Shirtliff, as damages for the non-performance of said contract, the sum of $98,00; that

Mott and Shirtliff acquiesced in the award, and Mott paid the sum of $98,00 to Shirtliff, and that said endorsement was made in consideration of said award, which evidence was admitted. The above mentioned suits were not prosecuted to final judgment, but were withdrawn.

The plaintiff offered to prove further, by *parol*, that at the time of making the submission, as aforesaid, the subject of the money advanced, as specified in the receipts, was not submitted, but *expressly* excepted in making the submission, and the only question submitted to arbitration, was, the subject of damages or penalty for the non-performance of the contract; and further, to prove, that Mott practised fraud in obtaining the submission. To this evidence the defendant objected, and insisted that the submission embraced the whole subject matter of the contract, and that the award operated as an extinguishment of the whole contract, and consequently of plaintiff's right of action.

The Judge decided that plaintiff might prove, that the defendant practised fraud in obtaining the submission, and that the receipts, which were the ground of the present action, were *expressly* excepted out of the submission, by the parties, at the time of making the submission.

The plaintiff introduced evidence tending to show that the receipts were *expressly* excepted out of the submission; and also that defendant intimated, after the award was made and published, that it would cut off the receipts.

Verdict for plaintiff. Exceptions by defendant, &c.

For defendant *Aldis* and *Turner* insisted:

1. That the lumber contract between Shirtliff and Mott, by the writing on the back of it, signed by Shirtliff and Mott, is completely discharged; the object and tendency of the above evidence was to destroy that discharge, by shewing that the damages, paid to Shirtliff for the non-performance of the contract, did not include damages that Shirtliff had sustained for money advanced on the contract, and therefore, that the foregoing writing, on the back of the contract, was not designed

as a complete, but only a partial discharge of the contract; this parol evidence contradicts the written discharge, and is not admissible. 3 Wills. 275. 2 Bla. Rep. 1249. Stra. 794, 1261. 5 Coke 27.

2. That an action of assumpsit will not lie to recover money advanced on a special contract, unless the contract has been rescinded *in toto*, and the parties placed in statu quo. If the contract has not been performed in whole or in part, the party may either rescind the contract, and recover the money advanced, or sue on the contract and recover damages for the non-performance; the party may take *either* remedy at his election, but he cannot have *both*. 1 Esp. 267. 1 Term. 133, Tower v. Barnett. 1 Doug. 23. Cow. 818. 7 Term. 181. 5 East. 451.

3. The award in this case was a satisfaction of the contract, and all claims under the contract, the plaintiff recovered and received damages, and he can have no other claim.

Contra. *Wetmore* and *Swift*—That parol evidence is admissible, to shew the consideration of the endorsment, on the back of the contract, and that the receipts were *expressly* excepted out of the submission. 3 Term. 474.

That a submission may be general, comprehending all matters in dispute, or special, including only some particular matter in dispute. Jac. L. D. Title Awards.

Opinion of the Court. It does not appear there was any evidence of fraud in obtaining the submission.

The endorsement on the contract does not express the consideration for making it; it was open to parol evidence to prove such consideration; when this was proved, the agreement endorsed might be limited in its effects, by the consideration on which it was made.

2. Admit the principles advanced by the defendant, that money advanced upon a special contract, is identified with the contract, that the party can have but one remedy, either for damages for non-performance, or action for the money advanced, on a total abandonment of the contract; and, that damages recovered in a suit at law, in the ordinary course,

would include money advanced, as well as special damages. Yet the plaintiff had a right to recover damages on two distinct grounds. One on account of the money advanced; the other such damages for the breach of the contract simply as he would have been entitled to, had no money been advanced. It was in the power of the parties to separate these claims, distinct in fact though connected in law; the amount of money advanced might be an admitted claim, and no dispute as to the amount, the damages distinct from the money advanced, might be a subject of dispute, and the parties could submit to arbitration the subject of damages arising from non-performance alone, and *expressly* leave the claim for money advanced as a distinct debt. Where the parties had thus, by *express agreement*, separated the two claims, each might be the foundation of an action, distinct from the other, one for the money, the other for the sum awarded, on the award.

3. The award derived its validity and effect wholly from the submission which was by parol, no other than parol evidence could exist as to the extent of the submission, and what it embraced.

4. It appears that the award in this case, was made upon a submission by parol; that the submission *expressly* excepted the receipts in question, and gave the arbitrators no other power, than to ascertain the amount of damages distinct from the money advanced; they made an award on this submission, this award was the consideration of the endorsement on the contract; the endorsement made upon this consideration could satisfy no part of the claim for money advanced; the defendant had voluntarily separated this claim from the one submitted, and the plaintiff is entitled to this action to recover the money.

New trial not granted.

No. 16.

HAWKS *against* BALDWIN & CO. *Washington*, 1819.

THE certificate of an officer, on the back of a writ, shewing legal service of the writ, is conclusive evidence, that the writ was so served, as between the parties to *that* suit.

Audita Querela. The said Hawks complains, that said Baldwin & Co. took out two writs of scire facias, in their favor, against him, as bail for one David Allen, and delivered them to David Harrington, a deputy sheriff, for service; that said Harrington not having served said writs, or given him any notice of the same, falsely made return that he served said writs on said Hawks, on the 17th day of February, 1817, by attaching said Hawks' body, &c. And said Hawks alledges in his complaint, that neither said Harrington, nor any other person ever served said writs of scire facias upon him, or gave him any notice to appear and shew cause against the same, and that he had no day in Court; that judgment was rendered against him on said writs of scire facias, and execution issued, and said Baldwin & Co. by virtue of said execution threaten to imprison said Hawks.

Plea. That the plaintiff from having and maintaining his action thereof, ought to be barred, because they say the said David Harrington, on the 17th day of February, 1817, was a legal deputy sheriff, in and for the county of Washington, and by law, had good right to serve said writs of scire facias, on the said Hawks, and then at Moretown, in said county, the said Harrington, being deputy sheriff, served said writs of scire facias, on the said Hawks, by attaching the body of said Hawks, and then and there reading the same in his hearing, &c.

Replication. That said Harrington, deputy sheriff, did not serve said writs of scire facias, on said Hawks, on said 17th day of February, or at any time before or after, and issue was joined to the country.

On the trial, at June term, 1818, the defendants gave in evidence to the Jury, the writs of scire facias described in the declaration, and David Harrington's returns thereon endorsed, by which returns it appeared the said writs were duly served by said Harrington, as deputy Sheriff.

It was conceded by the plaintiff that said Harrington was deputy sheriff, and had right to serve said writs in the manner they purported to be served. The plaintiff offered parol evi-

dence to prove, that the returns endorsed on said writs, were *false*, and that said writs were not served.

To the admission of parol evidence, or any other evidence, to controvert or disprove said returns, the defendants objected, because the sheriff was not a party to the present suit, and his returns on the writs of scire facias were conclusive evidence that the writs were served, which could not be controverted in any action where the sheriff or said Harrington was not a party.

The objection was over-ruled by the Judge, and parol evidence was admitted.

Verdict for complainant.

Motion for new trial, founded on exceptions to the decision of the Judge.

In support of the motion, it was contended:

1. An *Audita Querela* is, where a defendant against whom a judgment is recovered, and who is therefore in danger of execution, or actually in execution, may be discharged or relieved, upon good matter of discharge, which has happened *since* the judgment. 3 Black. 405. 2 Sand 148.

If the matter set forth in the *Audita Querela* would not amount to a sufficient discharge, if the party had an opportunity to plead it, it furnishes no cause for an *Andita Querela*, and no relief can be granted. Vide ut supra.

2. Where a writ is returned by an officer, as duly served, the defendant is estopped from denying the service, and cannot plead in abatement of the writ, by alledging a matter repugnant to the return; if the return be false, his *only* remedy is by action against the officer, for a false return. Slayton v. Inhabitants of Chester, 4 Mass. Rep. 478.

The return of a sheriff, that dower hath been set out on a writ of seizen of dower, by three disinterested freeholders is *conclusive*, and if not true he is liable to an action for a false return. Easterbrooks v. Hapgood, 10 Mass. Rep. 313.

If a sheriff return that he has warned defendant, when in fact he has not, Audita Querela does not lie, the remedy is

against the sheriff for a false return. 2 Saunder's Rep. 148, note.

In this case the plaintiff's remedy, if he hath been injured, is an action on the case, against the sheriff, the very person who caused the injury, and not an action against the defendants, who had no knowledge but that the writs had been legally served. The sheriff is empowered, in his own county, to serve and execute all lawful writs, &c. to him directed, and his certificate or return, is evidence of the service. 1 Stat. p. 308.

If any sheriff shall make a false or undue return of any writ, &c. he shall be liable to a fine not exceeding $100, and to pay the party grieved, all damages, thereby, in any way, sustained, with costs. 1 Stat. 312.

The question, whether the return of a sheriff, be false or true, can be tried *only* in an action against the Sheriff, for a false return. Vide cases before cited.

If the defendant is estopped from denying the service of the writ, and can alledge nothing in a plea of abatement repugnant to the officer's return, he cannot give such repugnant matter in *evidence* on Audita Querela, but is concluded by the return of the officer. This writ lies *only* where the party has a *good and sufficient plea*, and has had no opportunity to plead it.

Contra. An Audita Querela is said to be in nature of a bill in equity, an allegation of fraud and deceit seems to be essential, and the case supposed must be one where legal process has been abused and injuriously employed to purposes of fraud and oppression. But allegations of abuse are not to be heard as a ground of complaint, where the party complaining has had a legal opportunity of defence, or where the injury, if one has been sustained, is to be attributed to his own neglect, for otherwise litigation would be endless. Lovejoy v. Webber, 10 Mass. Rep. 101.

It is a well settled principle in Chancery that relief may be obtained, not only against writings, deeds, and the most solemn assurances, but against judgments, and decrees, if obtained by fraud. 1 Vesey 120, 284, 289.

A judgment, fraudulently obtained, may be relieved against in equity. 1 Johnson's Cases 491.

So it may be avoided at law. For fraud is an extrinsic collaterial act, which vitiates the most solemn proceedings of Courts of justice. Philips' Ev. 242.

Lord Coke says it vitiates all judicial acts, whether ecclesiastical or temporal. Formers' Case, 3 Co. R. 78.

In the present case the said D. Baldwin & Co. contend that the returns of Harrington, on the writs of scire facias, are conclusive, and estop Hawks from giving evidence to the contrary, on the issue aforesaid.

The return of a Sheriff, upon a writ which has been duly returned and filed, is *prima facie* evidence of the fact therein stated. Philips' Ev. 294. 11 East. 297.

But, if the Sheriff's return be conclusive, and operates as an estoppel, in *any* case, it cannot be so in the present, where it is only used in evidence to the Jury, on trial of an issue of fact. That which a party would avail himself of, by way of estoppel, must be so pleaded, and relied on as such.

By the Court. The returns of the officer, shewing that he had duly served the writs of scire facias, are *conclusive* between *these* parties; the complainant cannot controvert the returns, except in an action against the officer, for a false return.

New trial granted.

No. 17.

BRUSH *against* **COOK.** *Franklin*, 1819.

GRANTEE in a deed, need not prove the appointment of the public officer, whose duty it is to record such deed.

A Landlord is not concluded by a Judgment in ejectment, against his tenant, by parol lease, he must be joined in the suit, to be concluded by the Judgment.

THIS was an action on ejectment, for lot No 3, of the first division of land, in the town of Georgia, laid to the right of Josiah Willard, original proprietor.

Plea—Gencral issue.

Verdict for ptaintiff, and a bill of exceptions filed by defendants, &c.

1. On the trial the defendants offered to give in evidence, that a deed, from Abraham Ives to Ira Allen, with the following indorsement, in the hand-writing of said Ira Allen, "Received to record, Nov. 27, 1784. I. Allen, Prop. Clerk"—actually lay in the office of said Ira Allen, with said indorsement thereon, on file, from said 27th day of November, 1784, until the 7th day of August, A. D. 1805, and that, during said time, the said Ira Allen acted as Proprietor's Clerk, for said town of Georgia, which evidence was rejected.

2. The defendants offered to give in evidence the record and judgment of the Circuit Court, May term, 1810, in an action of ejectment, in favor of Robert Bowne, under whom defendants claim their title to said lot, against one James Goodwin, who (the plaintiff contended) was, at the time of bringing said ejectment in the Circuit Court, in possession of said lot under said plaintiff, by parol agreement and lease, by which record it appeared that the said Robert Bowne recovered a judgment for the seisin, &c. against said Goodwin, on trial, after a continuance of said cause, on application and motion of said Eliphalet Brush, this evidence was also rejected.

Opinion of the Court. On the first point the decision of the Judge is reversed. The proprietor's Clerk was made a public officer, for recording deeds of this description, and it was sufficient for defendants to establish the fact that Ira Allen *acted* as proprietor's Clerk, without shewing a regular appointment.

2. On this point, the decision of the Judge is confirmed; a landlord is not concluded by a judgment against his tenant by parol lease; such a judgment is subject to all the provisions of the Statute requiring a landlord to be joined in the suit. (Judiciary Act, Sec. 88.) Though the plaintiff's writ will not abate, if landlord is not joined, if tenancy is by parol, and unknown to the plaintiff. A landlord is not *privy* to the judgment against his tenant, merely by filing an affidavit and mov-

ing for a continuance in the cause; he must be made a *party* to the record, to be concluded by the judgment.

Verdict set aside, and new trial granted.

No. 18.

WOOLCOTT *against* GRAY. *Addison*, 1819.

WHERE an officer has neglected to return a writ, in an action on note, and is sued for his neglect, he may in his defence, impeach the note, as having been fraudulently obtained of the original defendants.

In such action the officer may give in evidence, in mitigation of damages, that the original defendants are within the reach of process, and responsible.

ERROR brought to reverse judgment of Addison County Court.

The original action was an action on the case, brought by Gray against Woolcott, as Sheriffs Deputy, for neglecting to return a writ, put into his hands to serve, in favor of said Gray, against Simeon Barnum and Cyrus Barnum, in an action on note. The writ was served on Simeon Barnum *only*, Cyrus Barnum being then out of the State. The officer failed of returning the writ to the Justice who issued it; On the trial of the action against Woolcott, the defendant offered to give in evidence, that the note, on which Gray's action against the Barnums was brought, was fraudulently obtained and void; and, secondly, that said Barnum had ever remained within the reach of process, and might have been sued again, and was amply responsible, all which evidence was rejected. Error assigned, the exclusion of the evidence as aforesaid.

For the plaintiff in error, *Seymour* contended—That it was essential to Gray's right of recovery against Woolcott, that he should have substantiated his demand against the Barnums; although the note was *prima facie* evidence of indebtedness, yet it might be impeached, and it was competent for Woolcott to take the burden of proof on himself, and shew the note to be void, and shewing the want of an indebtedness was a complete defence for Woolcott. Alexander v. Macauly, 4 T. R. 611.

2. If there was an indebtedness from Barnums, yet it was proper for Woolcott to have shewn in mitigation of damages, that nothing but the price of the writ was lost, by its not having been returned; by shewing that the debtor might at any time have been taken upon a new processs, and that he has ever remained responsible for Gray's claim. 1 Strange 650. 1 Bos. and Pul. 27. 1 Johnson 215. Esp. N. P. cases 475.

Contra. *Chipman*, for defendant in error—It was necessary for Gray to prove a good cause of action against S. & C. Barnum; he did so, by proving his note, but it was not competent for the defendant to impeach that cause of action; if this were permitted, then, under the plea of *not guilty*, the *officer* might make this defence even if the cause of action was a specially although the *debtor* would have been obliged to plead specially and apprize the plaintiff of such defence.

2. Insolvency of the debtor may be given in evidence in mitigation of the damages, but not that the debtor is still able to pay.

The Court decided—That the officer ought to have been permitted to impeach the note, and that the evidence he offered for that purpose, ought to have been admitted.

2. That the evidence offered in mitigation of damages ought also to have been admitted.

Judgment. That there is error.

See Assumpsit 4. Bail 1, 2. Ejectment 2, 3. Commission. Fraud. Highways 2, 3. Landlord and Tenant 2. Patent Right. Pauper Cases 2, 3, 9. Judgment 2.

EXCEPTIONS—See New Trial 1, 3.

EXECUTORS AND ADMINISTRATORS.

No. 1.

ADMINISTRATORS OF DODGE *against* WETMORE ET. AL.

Franklin, 1819.

AN administrator, appointed in the State of New-Hampshire, and not in this State, cannot maintain an action, in this State, in right of the deceased, for property lying in this State.

If an action, on Jail bond, defendants are not estopped, denying plaintiff's right, as administrators, although they recovered the original judgment in that capacity.

THIS was an action on Jail bond, in favor of plaintiffs, of New-Boston, in the County of Hillsborough, and State of New-Hampshire, administrators on the estate of William B. Dodge, against the defendants.

Plea in abatement. That the plaintiffs, are not administrators, on the goods, chattels or estate of William B. Dodge, lying and being in the State of Vermont.

Replication. That plaintiffs, are administrators, &c, duly appointed, according to the law of *New-Hampshire*, demurrer.

Farrand, for plaintiffs, contended—That as the former judgment was recovered, by plaintiffs, as administrators, and the bond was executed, to them, by defendants, naming them administrators, the defendants, are estopped from alledging the contrary.

By the Court. The plaintiffs, cannot be recognized, as administrators, on the estate of William B. Dodge, lying in this State; this suit is brought in *right* of the deceased, and cannot be sustained: as, the defendants cannot be protected, by a payment, to the plaintiffs; the previous proceedings, cannot estop the defendants, from contesting the right of the plaintiffs, to maintain this action.

Judgment. Replication insufficient and writ abate.

HARVARD LAW SCHOOL LIBRARY.

No. 2.

LEE *against* HAVENS. *Addison*, 1820.

AN administrator, appointed in another State only, the intestate being a citizen of this State, acquires, by virtue of such appointment, no interest, in simple contract debts, due from resident citizens of this State.

Such administrator, cannot endorse a note, against a citizen of this State, as aforesaid, so as to convey any right to the endorsee.

CASE stated. William Havens, then of Weybridge, in the

County of Addison, executed his note, to Ezekiel Lee, of Barre, in the commonwealth of Massachusett, of the following tenor:

"*Addison, Sept.* 16, 1812.

"For value received, I promise to pay Ezekiel Lee, or his order, two hundred and eleven dollars, &c.

"WILLIAM HAVENS."

Previous to September, 1814, Ezekiel Lee died, having appointed, by his will, Martha Lee his Executrix, who duly proved the will, in the Probate Court, for the County of Worcester, and commonwealth of Massachusetts, where the testator last resided, and took upon herself the execution of said will: Afterwards Martha Lee died, leaving the estate of Ezekiel Lee unsettled, and administration thereof was duly granted *de bonis non*, with the will annexed, to Samuel Lee, of said Barre, by the Probate Court, in said County of Worcester. The will of Ezekiel Lee, was never proved in any Probate Court, in this State, nor was administration of the estate of Ezekiel Lee, granted to said Samuel Lee, by any Probate Court in this State: Afterwards, and before the commencement of this suit, Samuel Lee, administrator, as aforesaid, endorsed the said note in due form of law to the plaintiff: The defendant has ever been a resident citizen of this State, from the date of the note to this time. Statute of limitations waived.

If the Court are of opinion the plaintiff ought to recover, then judgment to be rendered for plaintiff, otherwise, plaintiff to become non-suit.

For plaintiff *D. Chipman*—That, the act of an administrator, in a foreign State, which is valid there, is to be considered valid, when called in question, in a suit in this State; whether, such act be the assignment of a note, sale of land, or any other act, valid, by the laws of the State, where it has been transacted; and, that, whether an administrator, can sue, in that capacity, in this State, without taking out letters of administration, in this State, is immaterial, in this case.

Contra. S. S. Phelps—That Samuel Lee had, by virtue of his authority, derived from the Court of Probate, in Massachu-

setts, as administsator of the estate of Ezekiel Lee, deceased, no interest in, or control over, the note in question, the same being effects of the deceased within this State ; and he could neither recover on the same by action brought in his own name, or transfer to any other person the right so to recover.

I. On *principle.*

1. The administrator is the mere officer of the Court of Probate, and derives his authority, not from the intestate, but, solely, from the municipal authority of the State in which he is appointed. 2 Black. Com. 506, 509.

The disposition of effects, left vacant by the decease of the owner, is a mere matter of municipal regulation; from this source, the jurisdiction of the Court of Probate is derived, and not from any delegation by the last owner of such effects : It is therefore like that of every municipal officer *local :* The power of its officers cannot be more extensive than that of the Court itself: The jurisdiction of a Court of Probate, is a jurisdiction *in rem*, commencing when the power of the owner of the effects ceases ; and being in its nature local, does not extend to effects not within the limits of its jurisdiction. The note in question, is effects of the deceased, in this State ; for, the power of the creditor or payee over the same ceasing, ere that of any Court of Probate attaches, there is nothing but the *residence* of the *debtor* or *maker* to give jurisdiction.

2. It is contrary to the policy of our laws, to permit a foreign administrator to act ; if an administrator abroad can withdraw the effects of the deceased from the State, the State must lose its priority, and creditors here, resort to a foreign jurisdiction for their pay ; where, perhaps, a priority is established, so that they may be excluded ; besides, they have not, in such case, the security for the due administration of the effects, which our law requires.

3. It will not be contended, that the Probate Courts, in Massachutets, can exercise jurisdiction over lands lying in this State ; if therefore, they *can* authorise an administrator to act at all, in this State, they cannot order a sale of lands, if neces-

sary for the payment of debts, nor an assignment of dower to the widow, nor a distribution among heirs: To suppose an administrator can act *at all*, when he cannot proceed to a full discharge of his duties, is absurd. If an administrator, appointed abroad, cannot administer upon lands in this State, one must be appointed here, for that purpose. We have then *two* administrators upon *one* estate, one, appointed in Massachusetts, to administer upon personal estate, and one, appointed in this State, to administer upon the real; this mode of proceeding is impracticable. Which shall pay debts? The administrator in Massachusetts. How can the Court of Probate in this State enforce that duty? But, if the personal estate is not sufficient for that purpose, the real must be sold, and he has no control over it. Shall the administrator in this State pay debts? He has no control over the personal property, and the real cannot be sold if the personal be sufficient; if it is not sufficient, how shall the Court of Probate, in this State, know that fact? Where shall creditors prove their claims? Suppose a mortgage, in this State; which shall control it? Suppose an administrator, appointed in Massachusetts, sues a note in this State, recovers judgment, and is obliged to levy on lands, what shall be done with it?

4. Our Statute provides for the probate, in this State, of *wills*, which have been proven abroad, 1 Stat. 145; if the probate of a *will*, *abroad*, gives to the *executor* authority to act, in this State, this Statute is unnecessary: The Statute requires *bonds* of the executor, in such case; if he can act, without authority from our Courts, *this* provision is nugatory; so, it requires notice to all concerned, and gives a right of appeal.

Any person interested, may procure a probate of the will, and the Judge may, thereupon, in his discretion, grant administration with the will annexed. This ousts the jurisdiction of the Court abroad.

If an *executor* appointed abroad, whom the testator nominated to that office, and in whom he reposed a personal confidence

cannot act in this State, without authority from our Courts; *a fortiori* an *administrator* cannot.

5. The Courts of Probate, in this State, have jurisdiction where the deceased *resided* abroad.

1. They have jurisdiction upon general principles, for reasons above stated.

2. Our Statute *expressly* gives them jurisdiction:

In case of a will. 1 Stat. 145.

In case of intestacy. 1 Stat. 142.

If they have jurisdiction over the effects here, the Courts where the deceased last resided, are excluded, for both cannot have jurisdiction.

II. The view of the subject already taken, is supported by abundant authority.

1. The jurisdiction of an ordinary or Court of Probate is local.

In England. It has ever been held, that an ordinary has no power over effects, not within his diocese. 3 Black. Com. 509. Bac. Ab. Exrs. E. Adams v. Savage, 1 Salk. 40.

So of the Metropolitan. If a man dies, having effects in two provinces, administration must be granted in both. "For they are two supreme jurisdictions, and neither can act in the other." Bac. Ab. Exrs. E. Allison v. Dickinson, 1 Hard 216.

So, no notice is taken, in England, of administration granted abroad; but administration must be taken out there. 11 Vin. Ab. 73, 76. 2 Com. Dig. 256. 8 Ves. Jun. 44.

If a man dies, leaving effects, in England, and in Ireland, administration must be granted in both. Bac. Ab. Exrs. E. 11 Vin. Ab. 76.

So a grant of administration, in England, does not extend to the American colonies. Atkins v. Smith, 2 Atk. 63. Wright v. Mott, 1 H. Black. 146.

2. In the United States.

An executor or administrator, appointed in a foreign State has no authority in the United States. Grovener v. Harris, 1

Dallas 456. Dixon v. Raversay, 3 Cranch 319. Select men of Boston v. Boylston, 2 Mass. R. 384.

Letters of administration granted in one State, confer no authority to act in another, nor to control effects lying out of the State, in which the administrator is appointed. Riley v. Riley, 3 Day 74. Champlin v. Tilly, 3 Day 304. Cir. Court U. S. Stanton v. Holmes, 4 Day 87. 1 Hayn. 354. Goodwin v. Jones, 3 Mass. R. 514. Fenwick v. Sears, 1 Cranch 259.

An administrator, appointed in Massachusetts, cannot, *as such*, maintain ejectment in this State. (See No. 5.)

An administrator, appointed in another State, is not, *as such*, liable, in Massachusetts, to an action, so as to charge lands of his intestate lying there. Borden v. Borden, 5 Mass. R. 67.

Nor is an administrator, appointed *there*, holden to account *there*, for effects, received by him in another jurisdiction. 2 Mass. R. 384. 8 Mass. 506.

Finally. The authority, granted by the Probate Court, in Massachusetts, does not purport, nor is it understood by that Court, to extend beyond the jurisdiction of the State.

The rule is settled, in that State, by its Supreme Court, which is also a Court of ultimate jurisdiction, in probate matters, that, grants of administration in one State, confer no authority to act in another. 2 Mass. R. 384. 3 Do. 514. 5 Do. 67. 8 Do. 506, cited above.

The extent of the authority, conferred by letters of administration *there*, must be determined by the laws of *that* State, and they, having settled the *rule*, as above stated, *their* acts must be construed with reference to it, and *their* grants of administration are to be taken as subject to that limitation.

Our Courts will not, it is believed, extend the authority of the administrator, farther, than the Court, from which that authority is derived, intended to extend it.

2. Debts due are bona notabilia. Bacon Ab. Exrs. E. Byron v. Byron, Cro. Eloiz. 472.

A simple contract debt, is bona notabilia where the debtor resides. Bac. Ab. ut supra. Hillard v. Cox, 1 L. Raymond

562. Adams v. Savage, 1 Salk. 40. Goodwin v. Jones, 3 Mass, R. 514.

A promissory note is a simple contract debt, within the above rule. Bac. Ab. ut supra.

The endorsement of the note makes no difference; for the incapacity of the administrator, is not a mere incapacity to sue, but a total want of interest in, or control over, the note in question.

By the Court. The administrator, appointed in Massachusetts, *only*, has not, *as such*, any interest, whatever, in the property, left by the deceased, in this State, and can exercise no control over such property.

2. The note in question, is property of the deceased, in this State, where the debtor resided. The plaintiff obtained no right to the note, by the endorsement, and cannot sustain this action.

The plaintiff became non-suit.

No. 5.

TUCKER, EXECUTOR, *against* STARKS & BELL. *Franklin*, 1819.

AN executor has no authority under a will, until the same is approved or allowed by the Judge of Probate.

THIS was an action of ejectment, tried at the October adjourned term, 1819.

Verdict for plaintiff.

A bill, containing several exceptions, was filed. The opinion of the Court was founded on one exception *only*, as follows: The plaintiff offered the letters testamentary, by which he is executor. Defendants objected; that they had never been approved by the Judge of Probate, objection over-ruled. The record of the Court of Probate, was in substance, that the subscribing witnesses to the will, appeared before the Judge of Probate, and made oath that the testator signed and sealed the will, in their presence, and that he was of sound mind. It did not appear, that there had been any approval or allowance of

the will, by the Judge of Probate, but merely a recital of the evidence without any judgment or decree.

The Court decided that the plaintiff had no authority to act under the will, and a new trial was granted.

No. 4.

MURDOCK *against* MATTHEWS. *Addison*, 1820.

WHERE the administratrix of A, had, by mistake, discharged a debt due from the executor of B; after the mistake is discovered by both, before the estate of B is settled by the executor, or a quietus obtained by him; administratrix may compel payment of the original debt by the executor, and his bond, to the Judge of Probate, is holden for the payment. The administratrix is not obliged to look to the executor in his individual capacity.

THIS was a scire facias, on a judgment formerly rendered on a Probate bond, executed by Jesse Hanford, executor of the will of Samuel Murdock, deceased, as principal, and defendant as surety. On the trial of this cause, the defendant gave in evidence a receipt in writing, of which the following is a copy:

"*Castleton, Nov.* 2, 1809.

"Received of Jesse Hanford, executor of the estate of Samuel Murdock, deceased, $355,31, in full of all demands I have against the estate of Samuel Murdock, as will appear by the records of the commissioners, the above sum being endorsed on a note that the said Samuel Murdock held against the estate of Throop Murdock, late of Castleton, deceased.

"PRUDENCE MURDOCK, *Administratrix.*"

The execution of the above receipt, having been proved, the plaintiff duly proved the following facts, viz: That the plaintiff was administratrix on the estate of Troop Murdock, deceased; that the note against this estate, on which the amount of said receipt was endorsed, as therein stated, was a demand on which there had been previously allowed by the commissioners, on the estate of Troop Murdock, the sum of $600, in favor of Samuel Murdock; that after the execution of said receipt, it was discovered by the plaintiff, that the greater part of said sum of $600 had been paid to the said Samuel Mur-

dock, by the said Troop, in his life-time. Whereupon, upon application of the plaintiff, the report of the commissioners on the estate of Troop Murdock, was set aside, and new commissioners, duly and legally appointed, on the said claim of said Samuel, against the estate of said Throop, who reported there was due to the said Samuel, from the said Throop, at the time of his death, which happened on the 22d day of February, 1801, the sum of $175,02, which report was affirmed on appeal to the Supreme Court; that the above sum of $355,31, was not taken into consideration by said commissioners, as having been paid on said demand, but that the said sum of $600 was reduced to said sum of 175,02, by payment made by said Troop in his life-time.

These proceedings were had, before the said Hanford had completed the settlement of Samuel Murdock's estate, or been discharged from his trust by the Court of Probate.

The Judge instructed the Jury, that the legal effect of said receipt was done away, except so far as it embraced the said sum of $175,02, and the Jury accordingly found a verdict for the plaintiff, for the amount due on the above-mentioned sum of 355,31, after deducting the above sum of $175,02, and interest thereon.

Motion for new trial, founded on *exceptions* to opinion and charge of the Judge.

In support of the motion, it was contended, by *D. Chipman*, for defendant:

1. That the receipt must operate to discharge Hanford, in his character as executor; the settlement was not void, but cancelled the original claim against the estate of Samuel Murdock, and the only remedy of the plaintiff, was against Hanford, in his individual capacity; if plaintiff had paid the money instead of discharging a debt against the estate of Samuel Murdock, her only remedy would be against Hanford, as an individual; so, in this case, where the action was brought to recover a debt discharged by mistake.

Hanford could not charge this sum to the estate of Samuel Murdock.

2. But, if the executor is not discharged, this claim cannot be set up against the surety; for here was *apparently* a complete discharge of the debt against the estate, and this is sufficient to discharge the *surety*.

The plaintiff's only remedy is by an action of money had and received, against Hanford, in his individual capacity.

Contra. S. S. Phelps—The receipt is evidence, merely of a set-off of the two claims, mentioned in the statement of the case; one of these claims was afterwards discovered not to be due, and was so settled by judgment of the Supreme Court; if the demand against the estate of T. Murdock was not due, the plaintiff's demand was not satisfied, and the receipt, being given under a mistake, did not discharge the plaintiff's demand; it remained *in statu quo*. The plaintiff, having never received satisfaction of her claim, is not without remedy, she must maintain, either,

1. Assumpsit for money had and received, against Hanford, or,

2. Pursue her original claim against the estate of Samuel Murdock, in the same manner as if the transaction in question had never taken place.

But, assumpsit for money had and received could not lie against Hanford, in this case—no money, or any equivalent to money, passed to Hanford, he could not be liable *de bonis propriis*, because all he received was a discharge of a debt, against the estate, for which he was liable only, *de bonis testatoris*.

The circumstance that this action is against the bail of Hanford, makes no difference, for, if there was no payment to avail the principal, it could not avail the surety.

Hanford had not fully administered, when the report, in favor of Samuel Murdock, against the estate of T. Murdock, was reversed; whatever might have been the state of the two claims, while that report was in full force, when it was reversed.

it became the duty of Handford, *as executor*, to pay plaintiff's claims; his failure to pay was a breach of the bond.

The proper remedy of the plaintiff, was, to treat the attempt at payment, as a nullity, and to proceed on the original cause of action. Mr. Phelps cited Clark v. Mundall, 1 Salk. 124. 12 Mod. 203. Ward v. Evans, 2 L. Raymond 928. Lord v. Travers, 12 Mod. 408. Packford v. Maxwell, 6 T. R. 52. Owenson v. Morse, 7 Tem. Rep. 64. 1 Esp. 5.

By the Court. The direction of the Judge to the Jury, is affirmed; the plaintiff had a right to treat the receipt as a nullity, and proceed to prosecute her claim against the estate of Samuel Murdock, as though no set-off had been made: the error having been detected, before the estate was settled, it was the duty of Hanford, as *executor*, to satisfy the plaintiff's claim; and defendant, as surety, stands responsible, and is not discharged by the receipt.

Motion dismissed; and Judgment rendered on verdict.

No. 5.

ANONYMOUS. *Washington*, 1816.

AN administrator, in the State of Massachusetts, cannot, *as such*, maintain an action of *ejectment*, in the State of Vermont.

No. 6.

BRIGGS, ADMINISTRATOR, *against* PROBATE DECREE. *Windham*, 1817.

WHERE, on an appeal from the Judge of Probate, by the administrator, the cause, assigned for setting aside the decree, is, that the property inventoried, by him, was not the estate of the deceased; the Supreme Court will affirm the decree, with interest, unless it appears clearly, that the estate inventoried was not assets in his hands; a doubtful right will not avail.

No. 7.

WILLARD *against* BREWSTER. *Addison*, 1816.

A promise, by an administrator, in consideration of assets, is good.

THIS was a promise to pay a note of hand against the intestate, made before the commissioners closed their doings, and the note was not presented to the commissioners for allowance.

No. 8.

ADMINISTRATOR OF DICKINSON *against* DUTCHER. *Franklin*, 1817.

AN administrator may submit to arbitrators, a *personal* claim in favor of, or against the estate, without the consent of the Judge of Probate.

An offer to pay the sum awarded, together with the refusal of the adverse party to accept the money, without the approbation of the Judge of Probate, supercedes the necessity of a *legal* tender.

CASE. Plaintiff commenced his action of assumpsit, against the defendant, demanding, in the first count of his declaration, three hundred dollars, for labor, done by the intestate, prior to the 10th day of September, 1813.

2d Count. Quantum meruit for the same labor.

The defendant, after pleading the general issue, gave notice, that he should give in evidence, on the trial of said issue, that, after the decease of the said Strong Dickinson, on the 12th day of October, 1814, the said Orrin, administrator, as aforesaid, and the said Daniel Dutcher, submitted said dispute to Nathan Green, Freeborn Potter, and Jacob Allen, as arbitrators, to award on or before the 15th day of October, 1814; that said arbitrators, on the 13th day of October, 1814, did award, that the defendant should pay to the plaintiff twenty dollars, in full satisfaction and discharge of the plaintiff's demand, for the work and labor done by the intestate for defendant. On the trial, the defendant produced Nathan Green, one of the arbitrators, who testified that he, Freeborn Potter, and Jacob Allen, were chosen arbitrators, by the parties, the cause was submitted to them, and the parties agreed to abide their award; that said arbitrators did make their award, in writing, and published

it to the parties, which award was, that the defendant pay to the plaintiff twenty dollars, due to said estate, for work and labor, done by said intestate, for the defendant; that defendant appeared satisfied with the award, and said he would pay said sum of money to the plaintiff, and the plaintiff said he would accept said sum of money, if the Judge of Probate approved of the procedure, and *not without.*

The counsel for the plaintiff requested the Court to charge the Jury, that by the Statute of this State, an administrator could not submit a dispute, or matter of difference, relating to the estate on which he administers, except by the consent or approbation of the Judge of Probate, and that an award of arbitrators, in pursuance of a submission, not approved by the Judge of Probate, could not be binding on the administrator. The council for the plaintiff also requested the Court to charge the Jury, that the testimony of Green did not prove that the defendant had himself complied with the award of the arbitrators.

The Judge charged the Jury, that an administrator could submit to arbitrators, without the consent of the Judge of Probate, so as to bind himself; and, that the defendant's offer to pay the sum of money awarded, together with the refusal of the plaintiff to accept the money, without the consent of the Judge of Probate to the procedure, superceded the necessity of a farther tender.

Verdict for defendant, and motion for new trial by the plaintiff, founded on exceptions to the decisions of the Judge.

By the Court. An administrator, having the absolute control over all personal property, and claims, belonging to the estate, may submit any personal claim, concerning the estate, to arbitrators, without the consent of the Judge of Probate. The administrator may be liable for a devastavit, in case he makes an improper submission; and the proceedings under the Statute are for the purpose of shielding him from any alledged devastavit.

The Statute does not confer any *additional* power on the ad-

ministrator, to dispose of, and control the debts, &c. of the estate, but provides a mode of settling certain disputes, concerning the estate, without litigation, and with safety to the administrator.

On the second point, the decision of the Judge is confirmed.

New trial not granted.

No. 9.

MATTHEWS, JUDGE OF PROBATE, *against* PAGE & HENSHAW.

Addison, 1818.

AN administrator's neglect to render an account of his administration, according to the condition of his bond, is a breach for which a *creditor* may prosecute.

THIS was an action on an administrator's bond, prosecuted by John Leonard, a *creditor*.

Case. In 1813, Nathan Hubbard, of Middlebury, in the Probate District of Addison, died; the defendant, Page, took out letters of administration on the estate, and on the 8th day of September, 1813, the said Page, as principal, and Henshaw, as surety, executed to the Judge of Probate, for the District of Addison, a bond for the faithful performance of his trust, in the usual form; that said Hubbard's estate was represented insolvent, and commissioners appointed to receive the claims against the estate, and make return of their doings within six months from the 8th day of September, 1813; that Leonard, the prosecutor, exhibited his claim to the commissioners, which was allowed at $101,35; that commissioners made their return to the Judge of Probate, of demands allowed by them on the 15th November, 1814; that, by the order and decree of said Court of Probate, the said administrator was directed to render and settle the account of his administration, on or before the first Wednesday of September, 1814, and this was likewise one part of the condition of the bond. The inventory was returned 5th January, 1814. No return was made by the administrator, of the account of his administration, until 17th February, 1817, when a settlement of the administrator's account was made

with the Judge of Probate ; and on the 17th February, 1817, a decree was made, that the administrator pay, by the first of March, 1817, the full sums, allowed by the commissioners, against the estate, without interest ; that the administrator has never paid any part of said demand.

The present suit was commenced on the 27th day of November, 1816.

The question for the decision of the Court, is, whether the administrator's not rendering and settling the account of his administration, agreeably to the order of the Judge of Probate, and condition of his bond, is a breach of the bond.

For the plaintiff it was contended—That it is necessary the administrator should render his account, before the Judge of Probate can ascertain what sum shall be paid to the creditors, and therefore the *creditors* are interested in the performance of this part of the condition of the bond.

Contra. For defendant—A mere technical breach will not entitle the creditor to prosecute ; the breach must be such an one as affects the prosecutor.

In this case, the commissioners did not return their doings, until after the time set, by the Judge of Probate, for the administrator to render his account ; there was no breach on the first Wednesday of September, 1814, and there could be no breach by a *subsequent* neglect to render an account.

The creditor should have applied to the Judge of Probate for an order on the administrator to make return.

By the Court. The neglect of the administrator to render an account of his administration, is a breach of his bond, for which a creditor may prosecute ; the administrator should have complied with the order, or procured further time to settle his account.

Judgment. That the plaintiff recover his debt ; and the prosecutor have execution for his damages and costs.

Seymour, for plaintiff.

Chipman and *Bates*, for defendants.

No. 10.

EXECUTORS OF BOTTAM *against* ADMINISTRATOR OF MORTON. *Chittenden*, 1818.

A note promising to pay A, administrator of B, a sum of money, may be sued in the name of the executors of A, after A's death.

ACTION of assumpsit, on a note signed by Deadat Morton, in his life-time, dated June 18, 1811, for 59,50, alledging that said Morton, in and by said note, promised, for value received, to pay to the said Lemuel Bottam, in his life-time, the sum of 59,50, in the month of October, then next after the date of said note, with interest.

Plea, non assumpsit.

On the trial of the cause, the plaintiff offered in evidence, a note in the words and figures following:

"$59,50. *Williston, June* 19, 1811.

"For value received, I promise to pay Lemuel Bottam, administrator of the estate of David Talcott, Junior, fifty-nine dollars fifty cents, in the month of October next, with interest."

The defendant objected to said note, being read in evidence to the Jury, insisting, that the action could not be maintained by the plaintiffs, as executors of Lemuel Bottam, but that the right of action is in the administrator *de bonis non*, of David Talcott, Junior.

The Judge over-ruled the objection, and admitted the note to be read in evidence, and a verdict was returned for the plaintiffs.

The defendant filed his exceptions to the decision of the Judge, and moved for a new trial.

In support of the motion, *Robinson*, for defendant, contended, that the said note was not taken and held by Bottam, in his own right, but in right of the estate of Talcott, and was a *chose* belonging to said Talcott's estate; that on the death of Bottam the note did not go to *his* executors, nor have they a right to sue for the same, as such executors, but the same remained as a part of the property belonging to the estate of Talcott and could be controlled by the legal representative of Talcott only,

although the administrator of Talcott could have collected this note, yet as it remained entire at his death, it passed to the administrator *de bonis non* as part of Talcott's estate unadministered.

The executor of an executor or administrator, in this State, does not by virtue of his executorship, become executor of the first testator or intestate, and acquires no right, *as such*, over their effects; but all the property rests in the administrator *de bonis non*, for the use of said estate of the first testator or intestate, and the said executor having no right, either in himself, or in his representative character, cannot maintain this action.

If this mode of proceeding be permitted, the defendant is deprived of his right of pleading in off-set, any counter-claim against the first testator or intestate.

It would also enable an executor to convert to the use of the estate of his testator all personalities left by his testator, as well those held by him as administrator of another, as in his own right, and this the creditors or heirs of the first testator or intestate, would be obliged to look to the estate of the last testator, and accept a small dividend, in case of insolvency, when if the two estates were kept distinct, they might be fully paid.

Contra. Gadcomb, for plaintiffs, insisted—That Lemuel Bottam, in his life-time, could have maintained an action on this note, *in his own right*, without naming himself as administrator, or stating that the note was executed to him, *as such*. The promise was made to *him*, it did not exist at the time of the death of his intestate. The *consideration* for the note, and which makes the *promise* binding, in law, on the defendant, passed from Bottam to Morton, after the death of Talcott.

The law, in this case, will presume that Bottam, the administrator, parted with *assets* in his hands, for which the note was given. If so, he would be *personally* liable for those assets, and consequently, would have a right to make the note, thus given, his own *personal* demand.

"An executor may recover, *in his own name*, money due to

the testator, in his life-time, and received by the defendant afterwards." Willes' Rep. 103. 1 Term. 477.

"So, in an action of assumpsit, brought on a foreign judgment, recovered by the executor, the plaintiff may declare, *in his own right*, and not as executor." Doug. Rep. 4.

"So, an executor may maintain an action, *in his own name*, against a sheriff, for the escape of a prisoner, who was in execution, on a judgment obtained by him, as executor." 2 Term. Rep. 126.

"So, where an executor pays money, which he was not obliged to pay, and afterwards brings an action to recover it back, he may declare in *his own right.*" 4 Term. Rep. 561.

Where the thing sued for is assets, in the hands of the executor or administrator, before the recovery, or where the cause of action arises in the *executor's* own time, and never did arise to the *testator*, there the executor may bring the action *in his own name*, or as executor. Willes' Rep. 105. 6 Mod. 92, 181.

Those authorities shew, beyond a doubt, the right of Lemuel Bottam, in his life-time, to sue, on the note in question, in *his own name and right.*

If then, *he* could thus sue, it is contended, that as a necessary consequence, the right of action survives to *his legal representative.*

It is a settled rule of law, that a contract may be declared on, according to its *legal effect*, and not its literal words; it is on this principle that Courts have decided where a note or promise is made to one, as executor or administrator, he need not sue *as such*, nor describe the note or promise as made to him in that capacity, but may declare in his individual character, as on a note or promise made to himself, such being in fact its legal nature. If he elects to sue in his own right, the words "administrator of Talcott," may be rejected as surplusage.

Suppose, at the death of Bottam, an action had been pending on the note *in his own right*, who should enter to prosecute the suit? Not the administrator *de bonis non* of Talcott; his right to enter must be denied from facts apparent on the face of

the writ; but there Bottam is not named as administrator of Talcott, nor is the note declared on, described as made to Bottam as administrator. The administrator *de bonis non* would, therefore, stand as a perfect stranger to the suit: The action would not die with the person who commenced it, being founded on contract. Some person had the legal right to enter and prosecute.

The executors of Bottam, as his legal representatives, finding the suit pending *in his own right*, and on a note, described, in the declaration, as made *to him*, have the right, and it is also their duty, to enter and prosecute the action to a final issue. If they could *prosecute* an action thus commenced by Bottam, there cannot be a doubt of their right to *commence* a suit on the note.

"Where an executor recovers in a case, in which he need not name himself executor, or dies intestate, or makes his executor, who will not prove the will, as to the first testator's goods, his executor or administrator (and not the administrator de bonis non of the first testator) shall sue execution, and would be liable to the costs of a non-suit." 6 Mod. Rep. 181.

The principles which governed the Court, in the above case, completely establish the right of the plaintiff to maintain the present action; in that case, although the executor sued in that capacity, when he might have sued in his own right and recovered judgment, either by *scire facias* or debt survives to his executor or administrator; and not to the administrator de bonis non, his executor or administrator, in case of a non-suit, would have been liable for costs; had a suit been commenced by Bottam as administrator, and judgment for the defendant on action of debt, on that judgment, after the death of Bottam must have been brought against *his* executors and not against the administrator de bonis non of Talcott.

If an executor or administrator sue, *as such*, on a contract made to him, when the cause of action arose after the death of the testator, he is *personally* liable for costs, in case of a non-

suit, otherwise where he sues on a contract made in the life-time of the testator or intestate.

If the administrator release a debt due the intestate and take a new note, or accepts a note, covenant or obligation for it, it is a devastavit; it is then considered *assets* in his hands, for which he is personally liable. Com. Dig. 1 vol. 362.

Where the defendant binds himself, or promises, *as administrator*, in a case where he was under no legal obligation, *as administrator*, he is personally liable on his bond or promise. 1 Term. Rep. 691.

As has been stated before, the note in question was executed to Bottam in consideration of a debt due the intestate, and which Bottam discharged, or goods and chattels, or money belonging to the estate, which were *assets* in Bottam's hands, delivered to Morton; in either of those cases, agreeably to the authorities last cited, Bottam was personally liable for the amount of the note thus taken, whether it should be collected or not; this *personal* liability must be accompanied with its corresponding *legal right* of holding the note as his own *personal* demand.

But, even if he would not, at all events, be personally liable to the estate for the note, he or his executors have a right to elect to have it so, and to hold the note as their own property, which they have done in the present case.

The decision of the Judge, at the trial, was confirmed and Judgment rendered on the verdict with additional costs.

No. 11.

WILLIAMS *against* **COOK.** *Caledonia*, 1819.

WHERE a cause is referred and the defendant dies before any award is made, his administrator may proceed with the reference.

THIS cause, at a former term of the Court, had been referred, before any proceedings were had under the rule the said Cook died, after his death an administrator being appointed, took out the rule and proceeded to obtain a report of the ref-

erees; the plaintiff attended at the trial before the referees; the referees made a report in favor of the defendant. At this term the administrator duly entered and moved that the report of the referees be accepted, and judgment rendered thereon.

The plaintiff excepted to the report for the following reasons:

1. It is not a report between the parties of record, at the time of making and ensealing the same, by the referees, there being then no legal defendant.

2. The administrator was not authorised to take out the said rule, assemble the referees, and cause the parties to be notified.

3. At the time of taking out said rule, and of the hearing before the referees, there was no legal defendant in said cause.

Contra. It was contended that the referees were bound to take notice of the Statute, and of the right of the administrator under it, to prosecute and defend.

2. That the plaintiff, by appearing before the referees, consented to their proceedings, and must be bound by their report.

By the Court. The administrator had a right to take out the rule and proceed with the reference.

Let the report be accepted, and Judgment rendered thereon.

No. 12.

FIRST CONGREGATIONAL SOCIETY IN SHARON *against* LOVELL & PERCEVAL ADMINISTRATORS OF E. PERCEVAL.

Windsor, 1819.

ACTION of covenant broken, by lessor against the administrator of lessee, for non-payment of rent accruing after the death of lessee, and after a commission of insolvency on the estate was closed.

Plea in bar—That the estate was represented insolvent, and that plaintiffs did not exhibit their claim to the commissioners, without averring that defendants had no assets, or that they had fully administered.

Held insufficient.

THIS was an action of covenant broken. The declaration stated, that on the 11th day of July, 1811, the plaintiffs, by lease, under hand and seal of the parties, demised and to farm

let to the said Ebenezer Perceval, a certain lot of land, &c. for the term of 999 years, reserving forty dollars annual rent; that the said Ebenezer covenanted to pay the rent, and also, that he, the said Ebenezer, his executors, administrators, or assigns, would erect and build, on the premises, within three years from the date of said indenture, a good, sufficient, and decent barn, at his and their own proper costs and charges, and keep and maintain the same, during the term aforesaid, in good repair; and, during the term aforesaid, keep and maintain the fences in good repair.

Breaches assigned:

1. The non-payment of the rent which fell due on the 12th day of March, 1815.

2. The not building the barn, either by the said Ebenezer in his life-time, or by the administrators, since his death.

3. Not keeping the fences in repair.

Plea in bar. That after the defendants were appointed administrators on Ebenezer Perceval's estate, on the 22d day of March, 1813, said estate was represented insolvent, and thereupon commissioners were appointed to receive and examine the claims of the creditors to the said estate; that said commissioners gave due notice, agreeably to the order of the Judge of Probate, of the times and places of their meetings; that on the 31st day of December, 1813, the said commissioners made return of their doings, with a list of claims presented to them; that the plaintiffs did not present their said alledged claims, on which they have brought their said action, to said commissioners, within the time set and limited, by the said Judge of Probate, for that purpose, as aforesaid; and, that from and after the commencement of the year, during which the rent accrued, which is claimed in and by said declaration, the said defendants did not occupy or in any way possess said premises, or take any profit from the same, or in any way prevent the plaintiffs from re-entering on said premises. Demurrer and Joinder.

Marsh and *Hubbard*, for the plaintiffs, contended—

1. That the covenant in this case is *real*, and runs with the

land ; the lands are assets, in the hands of the defendants, and pending the settlement of the estate, it was the duty of the administrators to perform the covenants, as much as to pay the taxes.

2. It was an accruing claim, and could not have been proved before the commissioners, the time for building the barn had not expired, when the intestate died, nor were the rents, now claimed, due at the time of his decease.

3. The personal representative is bound by all the covenants of the deceased, and he can exonerate himself, only by pleading he has no assets ; the law keeps its eye on the property, whether in the hands of the administrator or heir ; the defendant must plead, either that he has no assets, or plene administravit, either that he has no property of the deceased, or shew where it has gone ; the claim on the covenant, to pay rent, may be proved before commissioners, as to the rent due while the commission is open ; after that, the lessor may pursue the property, and all the property left by the intestate ; if the property remain in the hands of the administrator, *he* is liable ; if he has delivered over the property to the heirs, he is exonerated, and the *heirs* become liable. In this case the plea does not alledge that the estate was, in *fact*, insolvent, or that defendants have no assets, or that they have fully administered.

Contra. T. Hutchinson, for defendants, insisted—

That the Statute is peremptory, that all demands not exhibited to commissioners, shall be barred. Vol. 1. p. 153.

If otherwise, the administrators could never safely settle the estate of their intestate ; that the Judge of Probate has no right to allow the administrator's account, for paying any debt not on the commissioners' list of claims, except debts due the State, taxes, and funeral charges. Vol 1, p. 152.

Judgment. That the plea in bar, is insufficient, and plaintiff recover his damages and costs.

No. 13.

BUCKMINSTER *against* INGHAM AND WIFE. *Caledonia*, 1819.

A declaration in case, on the *Statute*, by a creditor of an intestate, against defendant, for embezzling and alienating the goods and chattels of the deceased, held bad. The declaration should be against the defendants, as executors, generally.

DECLARATION. In a plea of the case—For this, that one Zenas Newell, of said Peacham, in his life-time, at said Peacham, on the following dates, made and executed to the plaintiff, five promissory notes; (here the notes and the liability of Newell are set forth.) And now the plaintiff says that the said Zenas, afterwards, A. D. 1813, at said Peacham, died intestate, seized and possessed of goods, chattels, and rights, to the value of one hundred dollars, consisting of beds, bedding, tables, desks, and chairs, and other articles, which assets and chattels, as aforesaid, the said Catharine, wife of defendant, and then widow of the said Newell, deceased, intestate, as aforesaid, seized, took, and secreted, in her possession, and so continued to hold the said goods and chattels, belonging to the estate of said Newell, deceased, as aforesaid, and neglected to take out letters of administration, nor has any other person taken out letters of administration, upon the estate of the said Zenas, and so the plaintiff says that the goods, and chattels, and assets, so left by the said Zenas Newell, intestate, as aforesaid, remain not administered upon, nor has any administration been had upon the estate of the said Zenas Newell, so left, as aforesaid; when, afterwards, in 1816, the said Oliver, the defendant, intermarried with the said Catharine, the widow of the said Zenas; when the said Oliver and the said Catharine, defendants, together carried off, embezzled, and alienated to themselves, the said goods, chattels and assets, belonging to the estate of the said Zenas, deceased, as aforesaid, described as above, to the value of one hundred dollars, and continue to hold the same goods and chattels, (belonging to the estate of said Zenas, and left by him, as aforesaid,) without administering upon the same. Whereupon, the plaintiff says that the said Oliver and Catharine, by so taking, embez-

zling, and alienating to themselves, the goods, chattels, and assets, belonging to the said Newell, and left by him, and not administered upon, as aforesaid, have become executors in their own wrong, and are liable to, and stand chargeable with, the debts of the said Newell, deceased, and so contracted by the said Newell, in his life-time, and then and still due to the plaintiff, and specified in the said five promissory notes, as by the force and provisions of a Statute law of this State, entitled, "An Act for the Probate of Wills and settlement of intestate estates," passed March 10, 1797, will appear, and being so liable to pay the debts of the said Newell, as aforesaid, an action hath accrued to the plaintiff, to have and recover of the defendants, in manner aforesaid, the amount of his demands and interest. Yet, &c. To the damage, &c. fifty-three dollars.

Pleas. 1. That Newell did not assume and promise.

2. That Newell did not assume and promise within six years.

3. That action did not accrue within six years.

4. That defendants were never executors.

The Court decided—That the declaration was insufficient. Executor in his own wrong, must be sued as executor generally. Our Statute does not vary the form of action against executors in their own wrong, it only declares what acts shall make them such, and defines the extent of their liability.

See Abatement 6.

EXECUTION.

No. 1.

HOIT ET AL *against* BARRON. *Windham*, 1816.

IN Error. Levi Hoit, sheriff's deputy, attached property, on a writ, on which the plaintiff recovered a judgment. Execution issued and delivered to the sheriff, he demands the property attached, of Hoit, deputy sheriff, who offered other property to be levied on, sufficient to satisfy the judgment.

In action brought by the sheriff against Hoit and his bail, the above facts were traversed by plaintiff.

The Court (below) refused to admit evidence to prove the facts of property being offered to levy *execution* upon, unless it was the *same* property attached.

On bill of exceptions filed, and error brought, this Court set aside the Judgment.

No. 2.

ANONYMOUS. *Caledonia*, 1816.

OFFICER having in his possession, to be executed, execution, A against B, and execution, B against A, is not compelled to off-sett them, though requested so to do, by one of the parties.

See Assumpsit 3. Ejectment 3. Insolvent Estate 2.

F.

FALSE IMPRISONMENT.

No. 1.

ANONYMOUS. *Caledonia*, 1816.

ACTION of tresspass for an assault and battery and false imprisonment.

Defendant pleads legal process, by which the plaintiff was imprisoned.

Plaintiff replies that he was free from arrest, having obtained the benefit of the Jail delivery act, and avers he was admitted to the oath. Demurrer.

Court decided—That the replication was insufficient.

No. 2.

CLOW *against* WRIGHT. *Franklin*, 1816.

IN a case where a military officer, stationed on the lines of the territory, in time of war, seized, the person of an individual

who was transporting property towards the enemy's province, under circumstances to create a reasonable suspicion, that he was about to transport the same to the enemy, and immediately delivered him over to his superior officer.

The Court held the officer seizing was justified.

No. 3.

BOUTWELL *against* THOMPSON. *Washington*, 1817.

AN action of tresspass for false imprisonment, will not lie in favor of a minor, against the officer enlisting him, and commanding him in the army, though the consent of the parents was not given in writing. The minor, in this case, had not been discharged by *habeas corpus*.

No. 4.

NASON *against* SEWALL AND MITCHELL. *Franklin*, 1819.

WHERE a debtor has been arrested on execution, and discharged out of custody, by the creditor, and the same debtor is again arrested and imprisoned on an alias execution, issued on the same judgment, by the directions of the creditor, trespass for false imprisonment will not lie, for this second imprisonment.

Action for false imprisonment. Plea—Justification under final process, issued on a judgment, in the name of a third person, but the property of defendant. Replication—That defendant, as agent for plaintiff, purchased the judgment with plaintiff's property and for his benefit, and fraudulently concealed the purchase from the plaintiff, and caused the execution to be issued on which plaintiff is imprisoned. Replication held bad on demurrer.

THIS was an action of trespass, for an assault and battery and false imprisonment.

Plea, in bar, of Sewall—That heretofore, to wit, at the Circuit Court of the United States, May term, 1816, Lawrence Sallis, of the City, County, and State of New-York, and Francis Yvonet, of Troy, in the County of Rensellaer, in said State of New-York, recovered judgment against the said plaintiff, and one Bohan Shephard, for $1555,54 debt, and $35,37 costs; that on the 11th October, 1817, before the supposed trespasses, complained of in plaintiff's declaration, the said judg-

ment then remaining in full force, the said Lawrence and Francis authorised the said Henry to collect, for his own use and benefit, the said debt and costs, to take out execution in their names, and to pursue all legal measures for the collection of said debt and costs; that the said Henry, being so empowered, did, on the 12th day of October, 1817, cause to be issued a plevies Ca. Sa. (four former writs having issued and been returned unsatisfied) dated the day and year last aforesaid, signed, &c. and returnable within sixty days from date, directed to the Marshal, &c. that the said Henry put the said writ into the hands of David Robinson, Esq. Marshal of the District of Vermont, who, on the first day of November, 1817, took and arrested the body of the said plaintiff, and him has kept and detained in custody, under and by virtue of said writ of execution, and for the cause therein specified, and for the time in said declaration mentioned, which is the same supposed trespass, which the defendant is ready to verify, &c.

Replication. That on the 20th day of October, 1814, the said Bohan Shephard, being in execution, at the suit of the said Sallis and Yvonet, and in the common jail, in St. Albans, in and for the County of Franklin, aforesaid, being then admitted to the liberties of said prison, upon a certain jail bond, executed in that behalf, by the said Bohan and the plaintiff; and the said Bohan having committed no escape or other breach of said jail bond; afterwards on the 27th day of October, 1814, the said Bohan, at St. Albans, aforesaid, delivered and paid into the hands of the said Henry D. Sewall, a great amount of property, to wit, two thousand dollars, consisting of, &c. for the purpose of enabling the said Henry D. Sewall to purchase in, for the benefit of the said Bohan and the plaintiff, the said debt so due and owing to Sallis and Yvonet, as aforesaid; and the said Henry then undertook, as soon as convenient, to purchase in said debt, as aforesaid. And the said Bohan, not having before committed any escape or other breach of the said jail bond, afterwards at St. Albans, aforesaid, on the 28th October, 1814, with the knowledge and consent of the said Henry, and at his

request, departed from the liberties of said prison. And the plaintiff farther replies, and says, that afterwards, to wit, on or about the 15th day of January, 1815, the said Henry, in pursuance of his said undertaking, purchased in said debt from the said Sallis and Yvonet, for the benefit of the said Bohan and the plaintiff, with the estate so delivered to him by the said Bohan, for that purpose, as aforesaid. And the plaintiff farther saith, that the said defendant caused a suit to be duly instituted before the said Circuit Court on the jail bond, aforesaid, in favor of the said Sallis and Yvonet, against the said Bohan and the plaintiff, at October term, 1815, in which suit the judgment aforesaid, mentioned in the defendants' plea, was recovered, at May term, 1816, as set forth in the defendants' said plea. And during the pendency of said suit, and at all times previous, and until after the rendition of the judgment aforesaid, the said Henry fraudulently concealed from the said Bohan and the plaintiff, all knowledge and information of the purchase of said debt, by the said Henry, as aforesaid, and the said Bohan and the plaintiff remained ignorant of the purchase of said debt, by the said Henry, as aforesaid, until long after the rendition of said judgment; that the said Henry was, on the 11th and 12th days of October, 1817, and still is empowered by the said Sallis and Yvonet, as stated in his plea aforesaid. And the plaintiff further saith, that the said Henry, after the purchase of said debt, to wit, on or about the 27th day of February, 1817, and before the issuing of the pretended execution, dated October 12, 1817, by the defendant in his said plea mentioned, caused and procured an execution, in due form of law, to be issued on said judgment, in favor of said Sallis and Yvonet, against the said Bohan Shephard and the plaintiff, and afterwards, on the 2d day of April 1817, the said Henry caused and procured said writ of execution to be put into the hands of David Robinson, Marshal, as aforesaid, to serve and return, and then and there directed the said Marshal to arrest and keep the bodies of the said Bohan and the plaintiff thereon; and afterwards, to wit, on the 3d day of April, 1817, and while said writ

of execution was in full force, the said Marshal, in obedience to the command of the said writ and the directions of the said Henry, by virtue of said writ arrested the bodies of the said Bohan and the plaintiff, and them, then and there kept and detained in custody for a long time, to wit, for the space of five days. And the plaintiff further saith, that afterwards, to wit, at St. Albans, aforesaid, on or about the 8th of April, 1817, and while the said Bohan and the plaintiff so contiaued in custody of the said Marshal, as aforesaid, the said Henry ordered and directed said Marshal to release and discharge the said Bohan and the plaintiff from custody and imprisonment, under and by virtue of said writ of execution, upon condition that they should pay the said Marshal his fees on said execution; and the Marshal aforesaid, in obedience to the said order and direction of the said Henry, thereupon did release and discharge the plaintiff from all father custody, imprisonment, and restraint, in that behalf, all which he is ready to verify, wherefore, &c. Demurrer.

Causes. That plaintiff's replication is double and has tendered distinct matters to be put in issue:

1. The purchase of said debt as stated in the replication.

2. The arrest, imprisonment, and release of the plaintiff, as set forth in the replication.

For defendant, in support of the general demurrer, *Swift* and *Van Ness*:

1. It appears from the plaintiff's replication, that the imprisonment complaned of, was under a process of execution, regularly issued, by a court having power to issue the same; the plaintiff cannot, therefore, maintain trespass for this injury, but if any action will lie, it must be case. 1 Chit. Pl. 136, 164, 183, 186. 2 Chit. Pl. 242. 3 Term Rep. 185. 3 Esp. R. 144. 2 Black. R. 1190. 2 Wilson 302. 2 Doug. 671. 1 B. and P. 388. 7 T. R. 634. Cowp. 18.

2. By this action the plaintiff attempts to reverse the judgment of a Court having complete jurisdiction, which cannot be done in this collateral way; but must be considered good, to

all intents and purposes, until in some way set aside. 3 Term R. 125. 1 Stra. 481. 2 B. and P. 391. 7 T. R. 634. 1 Chit. Pl. 183. Phil. Ev. 225, &c.

In support of the special cause of demurrer:

Every plea must be single, entire, and confined to one single point. 5 Com. Dig. 385, 65. 5 B. and P. 76. 1 Bur. 320-4. 3 Bla. Com. 311. 1 Chit. Pl. 32.

Contra. Royce. The replication is an answer to the plea, for where a creditor has received a full satisfaction of his judgment, and discharged the debtor out of custody on execution, it is false imprisonment to arrest him again on the same judgment.

The public credit to be given to the signature of the clerk of a court of record, as well as the power of the court, will protect the *officer*, but not the *party*, who is guilty of an imposition on both.

To shew the replication duplex, the defendants must prove it to contain two separate and wholly disconnected facts, either of which alone entitles the plaintiff to recover. Bla. R. 1022.

The payment, and discharge, even though *separately*, entitling the plaintiff to recover, are yet so connected that plaintiff may well aver both; they form one entire transaction or defence to the execution and judgment.

Opinion of the Court:

The authorities are full in point, that tresspass will not lie in this case, and these pleadings present a strong case for their application. By maintaining this action the Court would, in effect, attempt to control the process of the Circuit Court of the United States; it would be very inconsistent that this Court should support an action for false imprisonment, for confinement on an execution issuing from that Court, while that Court may refuse to relieve the prisoner by setting aside the execution, and may even sustain an action for an escape, should he be liberated by the jailer.

2. As to the facts of misconduct of defendant, as agent of the plaintiff, and the purchase of the debt, as stated in the re-

plication, they were matters of defence to the original action, or perhaps, if discovered after judgment, causes for setting aside the judgment, by process brought to the Circuit Court, directly upon that judgment, and for that purpose; but, they cannot be *pleaded* in avoidance of the judgment in this *collateral* way, while that judgment stands in full force; the party and all acting under him must be justified in carrying that judgment into effect.

Replication insufficient.

FEMALE.

YOUNG *against* DAVIS. *Washington*, 1817.

A female of eighteen years of age, is of full age, under the Constitution and Laws of this State, for every purpose.

FORFEITURE.

No. 1.

BULKLY *against* ORMS. *Franklin*, 1815.

AN action for the value of the property will *not* lie against a private citizen for seizing property attempted to be transported contrary to law, the same having been *condemned* in the District Court.

The attempt to transport constitutes the forfeiture, and immediately divests the property.

No. 2.

PAGE *against* JOHNSON ET AL. *Addison*, 1816.

A bond of recognizance, for the review of a cause, is forfeited when the *judgment* is against the reviewer, though the damages are reduced by a second judgment.

This was a cause where the reviewer suffered a default.

FRAUD.

BARLOW *against* **ENOS.** *Franklin*, 1815.

IN an action of *fraud*, for false affirmation, in the sale of property, *science* is necessary to be stated and proved.

FRAUDULENT CONVEYANCE—See Purchaser 1, 2, Judgment 2.

FREEHOLD COURT.

MORGAN *against* **BARRET ET AL.** *Chittenden*, 1815.

BONDS for prosecution must be given before the warrant issues to bring the body before a Freehold Court.

See Abatement 6.

G.

GUARDIAN—See Abatement 4, 12.

H.

HIGH BAILIFF.

BUCK *against* **MARSH.** *Bennington*, 1816.

IN an action on a jail bond, the plaintiff declared on a jail bond taken and assigned by the High Bailiff, and did not alledge the cause of his (H. B.) acting as Sheriff.

On a writ of error, declaration held good; also, there was no error in this, that the writ, directed to the High Bailiff, acting as Sheriff, did not state the cause of its being so directed.

HIGHWAYS.

No. 1.

DANIEL BAILEY *against* TOWN OF FAIRFIELD. *Franklin, 1819.*

WHERE a minor is injured by the want of repairs in a road, so that the father sustains a loss of service, and is put to expense in curing the minor, the town is liable to the father on the Statute.

THIS was an action on the case—For that, whereas, by a certain Statute law of this State, entitled "An Act reducing into one the several Acts for laying out, making, repairing, and clearing highways," among other things it stands enacted:

"That if any special damage shall happen to any person or persons, or to his, her, or their teams or carriages, by means of any insufficiency, or want of repairs of any highway, or public bridge, in any town, within this State, the party sustaining such damages shall have a right to recover the same, in an action on the case, against such town, to be prosecuted before any Court, proper to try the same, together with costs."

And whereas, Polly Bailey, of Fletcher, in the County of Franklin, a minor daughter and servant of the said plaintiff, on the 23d day of October, A. D. 1813, in attempting to pass a highway, through a part of said Fairfield, leading from the dwelling-house of Burr Fanton, in said Fairfield, to the dwelling-house of Andrew Bradley, in said Fairfield, on horse-back, by means of the insufficiency and want of repairs of a public bridge, in said highway, in the town of Fairfield, the said Polly was thrown from said horse, and was thereby greatly injured and wounded, and had one of her legs broken; so that the said plaintiff, by means of the insufficiency and want of repairs of said bridge, lost the service of the said Polly for the space of nine months, and was put to great expence in providing for the maintenance and cure of the said Polly, to wit, the sum of two hundred dollars, to his damage, &c.

This action was tried at June term, 1819, and a verdict found for the plaintiff. A motion in arrest was then filed for the insufficiency of the declaration.

In support of the motion, it was contended:

1. That the Statute is a penal one and must be construed strictly.

2. That the meaning of the Statute is so clearly expressed as not to admit of a construction that will include this case.

Polly Bailey may have an action, and it is a loose construction to admit of several actions for the same injury.

If the Court go beyond direct and immediate injuries there is no stopping-place within the circuit of possible loss or injury.

There is no case of sueing for loss of service, except in case of assault and battery, or seduction, and there is no analogy between those cases and the present.

Contra. 1. The Statute is remedial, and must be construed so as to carry into effect the intention of the Legislature.

2. The injury complained of, in the declaration, is within the letter and spirit of the Statute; the words, "special damage," intend something more than direct injuries. When the Statute makes it the duty of a town to repair public bridges, this action may be maintained at common law, if the Statute be defective, and our case is within the common law, plaintiff may recover in this action brought on the Statute. Sal. 212. 1 Bla. Com. 89, 90.

Opinion of the Court:

1. The Statute, upon which this action is brought, is not a penal Statute, it only gives compensation for an injury, commensurate with the damage sustained.

2. The 18th section, taken together, evidently intends to embrace other damages than those sustained directly; the words, "special damage," to make sense, must mean other than direct bodily injuries; a strict construction of the words, "teams and carriages," would exclude the loss of a horseman by an injury to his horse; to make sense of the section taken together, and to carry into effect the obvious design of the law, every special damage must be included, which is known to the law, as

an *actionable* injury. The injury complained of, by the plaintiff, is a special damage, for which he has a right of action, and it must be considered special damage, in this case.

Motion dismissed.

No. 2.

BAILEY *against* **FAIRFIELD.** *Franklin*, 1818.

USE of a road, by travel, will not make it a public highway.

THIS case was tried before Judge Doolittle, June term, 1818, on the general issue.

Verdict for plaintiff.

Exceptions as follows:

The plaintiff offered to prove, by witnesses, that the road in question, had been *used for a public highway* for twelve or thirteen years previous to the time of trial.

To this evidence the defendant objected, contending that plaintiff ought to shew either a record of the laying out and surveying of the road, or an use of the same, as a public highway, for fifteen years previous to the damage complained of.

Objection over-ruled, and witness testified, the road had been used for a public highway, for twelve or thirteen years.

The Judge charged the Jury, that if they found the road in question, had been used as a public highway, for twelve or thirteen years, they ought to find the same to be a public highway within the perview of the Statute.

On this bill of exceptions the Court determined that a mere use of a road, by common travel, would not make it a public highway; but, that some act of the town, by their officers recognizing the road to be a public highway, was necessary, as by describing the road in the rate-bill and warrant issued to the highway surveyors.

No. 3.

JONATHAN EMERY *against* INHABITANTS OF WASHINGTON.

Orange, 1818.

IN an action on the case, against a town, to recover damages for an injury, sustained by a public highway being out of repair in a town, the plaintiff may prove the road to be a public highway, by parol evidence; that the Select men of the town laid out and opened said highway, that said road had ever since been used as a public highway, and that work had been done upon it, in the same manner as on other public highways, in said town, although there was no survey-bill, of said road, recorded.

THIS was an action on the case, for damage done to plaintiff's horse, by a public highway being out of repair, in the town of Washington.

On the trial, the plaintiff, to make out his case, offered to prove, by parol, that in the fall of 1812, the Select men of Washington laid out and opened said highway, and from that time to the present, had used said road as a public highway, and work had been done on it in the *same manner* as on other highways, in said town, but there was no survey recorded.

The defendants objected to parol evidence, and contended the *only* proper evidence was the record or copy of it from the Town Clerk's Office.

The evidence was admitted.

Verdict for plaintiff, and exceptions taken to the opinion of the Court.

In support of the exceptions, *Marsh* and *Hutchinson*, for defendants, contended:

That a road, laid out, never becomes a *highway* until surveyed, and the survey recorded, according to law, unless it has been used as such from time immemorial, or at least fifteen years, which, in this State, is the criterion of possessions in general; it must appear from the returns of the Select men, that they acted *officially*, and this can be shewn only by the return of their proceedings; nothing can be intended or implied from the acts of a corporation, as of an individual. A neglect to record, would be reason for an application to the County Court.

They cited Colden v. Thurston, 2 Johnson's Reports 424.

Gallelin v. Gardner, 7 Do. 106. Commonwealth v. Merrick, 2 Mass. R. 529.

Contra. *Baylies* and *Smith*:

1. The Statute says, the Select men have power to *lay out* and *open* roads; it further says, "every highway or road, which shall in future be laid out, or opened, shall be actually *surveyed* and a survey thereof, made out, entered and recorded in the Town Clerk's Office, of the town where such highway or road lies," &c.

Laying out, *opening*, and *surveying*, are distinct acts; *laying out*, and *opening*, are acts which can be proved by parol *only*; a survey may be made and recorded, still it would not prove that the road was *laid out* and *opened* by the Select men, or that work had been done upon it, and it had for years been treated as a public highway, by the inhabitants of the town. When the Select men laid out and opened the road, it was a public road, in *fact*, and in *law*; although they omitted to cause a survey to be made and recorded, ascertaining the breadth, &c. This part of the Act which requires such survey, is merely directory to the Select men, and their omission, *in this*, will not invalidate their *other* acts which made the road a public highway. 11 Johnson 403. 5 Cranch 242. 11 Mass. 447.

The traveller is to loose no right, by the neglect of the Select men, and they are to take no advantage of their own wrong. Parol evidence is the *best*, and *only* evidence in the plaintiff's power. 9 Mass. 312. 4 Binney 186.

Opinion of the Court:

The official acts of the officers, of the town, recognizing a road as a public highway, are proper evidence to charge the town with damage, sustained by a traveller, by reason of such highway being out of repair; and the parol evidence was properly admitted.

New trial not granted.

See Evidence 2. Joinder 2.

HUSBAND AND WIFE—See Deed. Pauper Cases 11.

I.

INDICTMENT.

No. 1.

STATE *against* EMERY. *Windham*, 1816.

INDICTMENT for larceny, to wit, stealing bank bills, in which the bills are thus described: "two five dollar bank bills or notes, and one two dollar bank bill or note, of the value of twelve dollars of the goods and chattels," &c. Held bad on demurrer.

The Indcitment ought to have stated the bills contained a promise to pay money, or perform some contract or argreement, under the Statute.

No. 2.

STATE *against* CHILLIS. *Addison*, 1818.

INDICTMENT charged, "that the prisoner feloniously was in bed with one Rosanna Blake, with an illicit, fellonious, and lascivious intent; the said Chillis being the lawful husband of another woman."

Motion in arrest, after verdict.

By the Court. The Indictment ought to have charged the illicit intent to be between them, so that both had an illicit intention. An illicit intent in one party *only*, would constitute a different offence from that charged in the Indictment.

Judgment arrested.

INFANCY—See Audita Querela 2. Minor.

INFORMATION.

STATE *against* SICKLE ET AL. *Bennington*, 1816.

IN an information, by a State's Attorney, it is not necessary for him to state, he informs under his *oath* of office.

INJUNCTION—See Malicious Prosecution.

INSANITY.

HALE *against* DUNCAN. *Caledonia*, 1817.

AFTER a person is regularly found to be insane, and the Judge of Probate has appointed guardians who have taken possession of his property, and returned an inventory; in an action against the insane person the personal property of the defendant, in the hands of the guardian, is not subject to attachment.

In case the Sheriff, did on such process, attach the personal property, and leave it in the hands of the guardians, he was held not liable for not having collected the execution, issued in the suit.

See Abatement 4. Trial.

INSPECTOR OF CUSTOMS—See Trespass 3.

INSOLVENT ESTATE.

No. 1.

PARMELEE *against* WOODBRIDGE. *Addison*, 1816.

THE rejection of a claim, by commissioners, on the estate of a deceased person, is no bar to an action against the survivor.

No. 2.

ADMINISTRATOR OF SMITH *against* **HOLMES.** *Rutland*, 1816.

THE defendant was constable, and attached the property of one Allis, at the suit of the plaintiff.

Judgment was rendered against Allis, and execution issued, April 4, 1813, and put into the hands of the officer, (Holmes) May 2; Allis died April 16, and his estate was represented insolvent May 7.

In an action, against the officer, for not levying and collecting the execution, he was held not liable, on the ground that the property of the person deceased, is not liable to be taken on execution, where the estate was represented insolvent.

Representing insolvent has relation back to the time of the death.

See Commissioners. Executors and Administrators 12. Pleas and Pleadings 10.

INTEREST.

HOUGHTON AND LUTWICK *against* **HAGAR.** *Addison*, 1820.

THIS was an action for goods sold and delivered.

Judgment for plaintiffs, by consent, and a question submitted to the Court, on the assessment of damages, whether the plaintiffs are entitled to interest.

The facts were, that the plaintiffs, at the time of their deal with defendant, resided in London, and the defendant in Montreal; the plaintiffs' account consisted of several items of goods, furnished at different times, and a number of items of credit. It did not appear, from the plaintiffs' bill, that any time of payment was stipulated, or any agreement for interest; no demand of payment had been made.

Seymour, for defendant, insisted, That interest ought not to be allowed, because it is not the *custom*, in the Province of Lower Canada, to pay interest in such a case, nor do the *laws* of the Province, in such case, compel the payment of interest,

and such is also the law in England. Cited, Haverland v. Bowerbank, 1 Camp. 50. Crakford v. Winter, 1 Camp. 329. Beraks v. Fuller, and notes, 2 Camp. 426, 430.

Contra, *Chipman*, for plaintiff: That there is no point of law, more unsettled, in England, than this; that in this case, the credit was given for six months, and that in the whole mercantile world, it was always customary to cast interest after the time of payment, and even before, when the debtor was making interest of the money.

By the Court. Let interest be cast from the service of the writ; it does not appear that there was any demand of payment before that time.

INVENTORY—See Executors and Administrators 6.

J.

JAIL BOND—See Bail Bond.

JAILS AND JAILERS—See Poor Debtor 1.

JOINDER.

No. 1.

FLOWERS, EXECUTOR, *against* KENT. *Bennington*, 1817.

AN Executor may join in the same declaration, a count for money had and received, to the use of the *testator*, and a count for money had and received, to his use, *as executor*.

No. 2.

PECKHAM *against* BURLINGTON AND COLCHESTER. *Addison*, 1818.

THIS was an action brought against defendants *jointly*, to

recover damages, sustained by reason of the insufficiency of a bridge, *between* the two towns.

After verdict for plaintiff, the counsel for defendants, moved to arrest the Judgment, for insufficiency of the declaration.

The Court decided:

That the action was properly brought against the two towns *jointly*, and dismissed the motion.

JUDGMENT.

No. 1.

BRADLY BARLOW *against* **BOWNE AND WALKER.**
Franklin, 1819.

ON the question, whether the omission of the word "whole," in the certificate of a deposition is fatal, Court equally divided.

Fifteen years' uninterrupted possession of a lot of land, claims title—vests the title in the possessor, and enables him to maintain ejectment.

A, in ejectment for a lot of land, recovers against B; C had, before the suit, been in possession of the land in question, and deeded to B, but the deed was not recorded; after the judgment A v. B, D purchases of C, having no knowledge of any conveyance from C to B; held D is not concluded by the judgment A v. B.

EJECTMENT for lots No. 99, 100, and 143, in the town of Georgia. Writ dated 15th, and served the 17th August, 1814.

On the trial, at June term, 1818, the following exceptions were taken:

Plaintiff claims, by possession, and offered a deed from Allis, an original proprietor, to Samuel Wells, dated 1789. Wells sold to Coon, who went into possession.

Plaintiff offered parol evidence, tending to shew, that those under whom he claimed, had been in possession, since the year 1793, through several occupants, to Joel Woodruff, who went into possession about the year 1800, and who deeded to plaintiff in 1813. Among other parts of the evidence, plaintiff offered the deposition of J. Mitchell, who testified that he had been in possession.

Defendant objected to the reading of the deposition, because,

in the magistrate's certificate of the oath, the word "whole" was omitted.

The Court over-ruled the objection, and admitted the deposition.

The defendant offered in evidence, a record of a judgment by default, in ejectment, in the Circuit Court, Robert Bowne (one of the present defendants) against Samuel Wells and N. Mansfield, for the same land, October 9, 1811; and, to connect this with the case, offered evidence tending to shew, that, while Woodruff was in possession, he made a deed to Samuel Wells, of the lands in question, (though it was not produced or ever recorded) previous to the deed from Woodruff to plaintiff, which evidence was admitted.

The Judge charged the Jury, that if they found that the plaintiff, and those under whom he claimed, had been in the uninterrupted possession of the land, claiming title for 15 years, such possession would vest the title in the plaintiff, and support his action of ejectment.

The Judge farther charged the Jury, that if they found that Woodruff did make a deed, of the lands in question, to Wells, (the same never having been recorded) it would not affect the right of the plaintiff, unless he had notice thereof, previous to his receiving the deed from Woodruff.

Verdict for plaintiff, and motion for new trial, founded on exceptions to the opinions and charge of the Judge.

The Court decided against the motion; the decisions of the Judge were affirmed, except as to the admission of the deposition of Mitchell; on this point the Court was equally divided. Judge Doolittle being of opinion the deposition was properly admitted, and Judge Brayton being of opinion the omission of the word "whole," in the certificate of the oath, was fatal; and that the deposition ought to have been excluded.

Motion dismissed, and new trial not granted.

No. 2.

TAPPAN AND SEWALL *against* DAVID R. NUTTING.

Franklin, 1820.

IN an action of ejectment, where the plaintiffs' title is the levy of an execution against the defendant's grantors, the defendant cannot avoid the judgment against his grantors by shewing that the original writ, in the suit against them, was not served on all the defendants.

2. The plaintiffs, in such case, in order to be entitled to contend that the conveyance from the grantors was fraudulent, as against creditors, is permitted, to shew a negotiable note executed by them to him, although the note had been endorsed in full, to a third person, and the endorsement stricken out.

THIS was an action of ejectment, for a tract of land in the town of Berkshire, described by metes and bounds, containing twelve acres.

Plaintiffs shewed the record of a judgment, in their favor, against Solomon Emmons, Horatio Emmons, and Adonijah Emmons, recovered at the August term of Franklin County Court, A. D. 1810, by which it appeared that they attached all the lands in Berkshire, (public lands excepted) in that suit, as the property of the said Solomon, Horatio, and Adonijah, on the 8th day of August, 1810. They then shewed the land in question, levied upon and set off on an execution, issued on this judgment, within five months after the rendition of the judgment. They then shewed a deed, from one Nathaniel C. Johnson, to the said Horatio and Adonijah Emmons, executed previous to April, 1810, a deed from H. & A. Emmons to Daniel Smith, in April, 1810, from Daniel Smith to James Churchill, in 1812, and from Churchill to defendant, in 1814.

On the trial, the plaintiffs contended, that the deed from Horatio and Adonijah Emmons to Daniel Smith, in April, 1810, was fraudulent, as against the plaintiffs, (creditors of the said Horatio and Adonijah) and therefore, void.

The following objections were taken by the defendant:

1. It appeared, by the original files, in the aforesaid suit of Tappan and Sewall, against the said Solomon, Horatio, and Adonijah Emmons, that the suit was instituted against them as late partners in trade, under the firm of Solomon Emmons and

Sons, by writ of attachment, dated August 4, A. D. 1810, returnable to Franklin County Court, at the August term of said Court, 1810, in which writ the said Horatio was described as being of Berkshire, aforesaid, and the said Solomon and Adonijah as of Clarendon, in the County of Rutland. On the original writ was rendered the following return, to wit:

"*Franklin, ss. August* 8, 1810.

"Then, by virtue of this writ, I attached all the lands (public lands excepted) in the township of Berkshire, with the appurtenances, &c. and on the same 8th day of August, aforesaid, I left a true and attested copy of this writ, with this return and a list of property thereon attached, thereon endorsed, at the dwelling-house of the within named Horatio Emmons, in said town of Berkshire; and, on the same day and year aforesaid, I left a like true and attested copy of this writ, with this return and a list of property hereon attached, thereon endorsed, in the office of the Town Clerk, in the town of Berkshire.

"Attest, S. BOWDISH, *S. D.*"

"*Clarendon, August* 15, 1810.

"Then, by the hand of Ozias Fuller, I left two true and attested copies of this writ, with my return and list of property hereon attached, thereon endorsed, to wit, at the last and usual place of abode of the within named Solomon Emmons, in Clarendon, on a table; and the other, at the last and usual place of abode of the within named Adonijah Emmons, in Clarendon, on a table.

"S. BOWDISH, *S. D.*"

It did not appear, by the record, aforesaid, that any notice to the said Adonijah and Solomon, or either of them, was proved in the said County Court. And it did appear that the plaintiffs took judgment against the said Solomon, Horatio, and Adonijah, by default, at the August term of said Court, 1810, and the record certifies "that the defendants did not appear in Court." Whereupon the defendant objected to the admission of the record, aforesaid, because it does not shew any notice of the suit to Solomon and Adonijah Emmons, as the certificate

of an officer in Franklin County, cannot prove an act, done by *another person*, in Rutland County.

The plaintiffs then offered to shew the docket of said County Court, for August term, 1810, by which it appeared, that the initial letters of the names of Aldis and Gadcomb were set to the cause Tappan and Sewall against Solomon Emmons and Sons, against the names of defendandants.

To this, the defendants objected, on the ground that it was offered to contradict the record, but the objection was overruled, and the docket shewn. Whereupon the Judge admitted the record aforesaid, to shew a good and valid judgment against the said Solomon, Horatio, and Adonijah Emmons.

2. The plaintiffs having requested the defendants to shew a bona fide debt against the said S., H. & A. Emmons, for the recovery of which, their suit, aforesaid, was brought; they offered the notes,* described in the writ against Emmons, and it appearing they had been endorsed in the usual form, by a full endorsement, by the plaintiffs, to one Charles G. Lester, (which endorsement, however, was at this time defaced and drawn over with a pen;) the defendant objected to said notes for the purpose of proving a *bona fide debt* due to the plaintiffs, in April, 1810, or at the commencement of said suit, in August, 1810.

The Judge over-ruled the objection, and admitted the notes for the purpose, aforesaid.

Verdict for plaintiff.

Motion for new trial, founded on exceptions to the opinion of the Judge.

Judgment of the Court:

On the first point, the Judgment of the County Court cannot be impeached in this collateral way; the Judgment must be considered valid, until set aside by proceedings, brought directly on the Judgment, and for that purpose. On the second point, the decision of the Judge is confirmed.

New trial not granted.

* The notes were dated before the deed from Emmons to Smith, and were negotiable

No. 3.

PEASLEE *against* STANIFORD. *Chittenden*, 1816.

A Judgment against the officer attaching property, in an action brought against him, by a third person, claiming the property, is not conclusive, upon the attaching creditor, unless the creditor had notice of the suit against the officer, so that he might have defended.

See Error 1, 2. False Imprisonment 4. Pleas and Pleadings 1. Audita Querela 4.

JURISDICTION.

No. 1.

TREASURER OF VERMONT *against* FRENCH ET AL. *Chittenden*, 1815.

A declaration, upon a recognizance, entered into before the Supreme Court, in a cause where the Court have appellate jurisdiction *only*, on demurrer, was held good, though the declaration did not state the cause, came into this Court by appeal.

No. 2.

STATE TREASURER *against* DANFORTH ET AL. *Bennington*, 1816.

IN an action upon a recognizance, taken before a Justice Peace, upon a complaint for a riot and an assault and battery, and made returnable to the Supreme Court. The Court decided the recognizance void, for that the Court had no original jurisdiction of assault and battery.

No. 3.

STATE'S TREASURER *against* FRENCH ET AL. *Chittenden*, 1816.

SUPREME Court having original jurisdiction of *Indictment or Information*, for assault and battery.

No. 4.

BRUSH AND HATHAWAY *against* **TORRY.** *Franklin*, 1819.

IN an action of debt, on judgment, brought before a Justice, his jurisdiction must be ascertained, by the amount due on the judgment, as appears by the record and proceedings, under the judgment.

ERROR brought to reverse a Judgment of Franklin County Court, rendered November term, 1819.

The plaintiff below, (Torrey) brought his action before a Justice Peace, on a confession note, for sixty dollars, stating that the sum of fifty-three dollars was allowed by the plaintiff, and agreed to be endorsed on said Judgment.

Plea—That the Justice had no jurisdiction.

Plea over-ruled by the County Court.

By the Court. The jurisdiction of the Justice must be determined by the amount due on the judgment, as appears on the record and proceedings under the judgment: Any payment, the evidence of which is extrinsic, cannot be taken into consideration, in determining the jurisdiction. In this case the declaration shews only that the sum of fifty-three dollars was *agreed* to be endorsed, and the jurisdiction of the Justice depended, not upon the amount due, as appeared on the record, but upon the existence of facts, the evidence of which was extraneous.

Judgment—There is error, and that Justice had no jurisdiction,

No. 5.

HARRIS *qui tam against* **BULLOCK.** *Windham*, 1819.

COUNTY Court has jurisdiction of action of *debt*, *on the Statute of usury*, over seven dollars.

THIS was an action of debt, brought to the County Court, by the plaintiff, as a common informer, to recover the sum of thirty-seven dollars and fifty cents, forfeited, by the defendant, in consequence of an offence against the Statute of usury.

Plea—To the jurisdiction of the County Court.

For defendant, *J. Phelps* contended—That the Statute of 1811, fully empowers Justices of the Peace, to try all cases of a *civil* nature, (except slander, &c. where the debt, &c. does not exceed fifty-three dollars; the County Court have not *concurrent* jurisdiction, and this case is a *civil* action. 3 Black. Com. 161.

But, if the action should be considered of a criminal nature, in which the State is a party, the *Supreme Court* has exclusive jurisdiction.

Contra. *J. Elliot* contended—That this is not a *civil* action, within the meaning of the "Act empowering Justices of the Peace to hear, try, and determine all pleas and actions of a civil nature, (with certain exceptions) where the debt or other matter, in demand, does not exceed the sum of fifty-three dollars;" but, that it is an action of a criminal nature, an action for an offence against a penal Statute, a suit for a crime or misdemeanor, and described as such, in an Act entitled "An Act for the limitations of sust on penal Statutes, criminal prosecutions, and actions at law;" and, that the County Court have cognizance of all criminal matters, of every name or nature, except such as are made cognizable *only* in the Supreme Court, or before Justices of the Peace; and, that this is not an action wherein the State is a party, because the State cannot become non-suit in the action.

By the Court. The Act defining the powers of Jutices of the Peace, limits their jurisdiction to the sum of seven dollars, in all cases where a penalty or forfeiture is incurred, by any act of a *criminal* nature, or which is denominated, by the law, an *offence.* Usury, by the Statute, relating to interest, is *expressly* called an *offence.* The County Court have jurisdiction in qui tam prosecutions for this offence, where the penalty forfeited is above the sum of seven dollars.

Judgment—Writ do not abate, and defendant answer over.

No. 6.

STATE *against* IRA SMITH. *Chittenden*, 1819.

SUPREME Court have jurisdiction of Theft under seven dollars.

THIS was an indictment for stealing two sheep, of the value of ten dollars, as alledged in the indictment.

Plea—To the jurisdiction.

That, by the laws of this State, all Justices of the Peace, within their respective Counties, are authorized to hear, try, and determine all complaints for larceny, where the property taken does not surmount the sum of seven dollars; and, that the value of the property, mentioned in the indictment, does not exceed the sum of seven dollars. Demurrer.

In support of the demurrer, *Follet*, State's attorney, contended—That the Supreme Court has jurisdiction, over the crime of theft, whether the value of the property be over or under the sum of seven dollars. Stat. 1 vol. p. 353, 56, 352, 169.

Contra. Van Ness and *Robinson:*

1. The value of the property is material, and the defendant is not concluded by the averment in the indictment, but has a right to put it directly in issue.

2. Justices of the Peace have exclusive jurisdiction where the value of the property does not exceed seven dollars; it is not material whether the Supreme Court have *common law* jurisdiction or not; it is sufficient that the Legislature has given another Court jurisdiction in this *case*; the difference of punishment in case of a conviction in the Supreme Court or before a Justice of the Peace, is conclusive that the Supreme Court has not concurrent jurisdiction.

By the Court. The jurisdiction of the Supreme Court, in criminal cases, is to be ascertained by a construction of the Judiciary Act taken together. The first section creates the County Courts, and defines their jurisdiction; the first thing to be noticed, is the different language (as it respects the Supreme Court) used in criminal and in civil cases. In criminal cases the County Courts "shall have cognizance of all criminal

matters," &c. In civil cases "shall have original jurisdiction, *exclusive* of the Supreme Court." The Legislature has simply given jurisdiction in certain criminal matters; but, in civil cases, has *expressly* given jurisdiction *exclusive* of the Supreme Court. The words giving jurisdiction to the County Court in criminal matters, contemplate a *concurrent* jurisdiction in the Supreme Court; "shall have cognizance of all criminal matters, of every name or nature, (except such as are made cognizable *only* in the Supreme Court;)" the Statute expressly giving jurisdiction to the Supreme Court, has made it exclusive in the cases specified in the Act; if the Supreme Court have no jurisdiction, but in cases specified in the Act, and of course *exclusive*, the word "only" was useless, it would be sufficient to say "except such as are made cognizable in the Supreme Court;" but, if the Supreme Court has other jurisdiction than exclusive, the word "only" becomes important, its omission would deprive the County Court of jurisdiction in all cases cognizable in the Supreme Court; the Act evidently contemplates that criminal matters are cognizable in the Supreme Court, other than those cognizable *only* in that Court, of such cases the County Court may take cognizance. In civil cases the expression is "(except such as are cognizable solely before the Supreme Court,)" but care has been taken *expressly* to give the County Court exclusive jurisdiction.

Section 6th constitutes the Supreme Court, and in defining its jurisdiction, evidently expresses what is intended to be its *exclusive original* jurisdiction only. Jurisdiction of the subject matter of a criminal nature, in all cases cognizable by the County Court, had been given expressly, by way of appeal, in section second.

The Constitution, section 4th, had made the Judges of the Supreme Court general conservators of the peace, throughout the State, so that the powers of the Court are not extended to any new *subject matter*, by taking original cognizance. The Judiciary Act recognizes in the first section, other jurisdiction

than exclusive, or that which is expressly given by Statute, and proceeds to curtail the Supreme Judicial powers of the Court, by *expressly* giving original jurisdiction to the County Court in *civil* matters *exclusively* of the Supreme Court of Judicature; original jurisdiction is no where *expressly* given to the Supreme Court, of any civil case, except where the State is a party; this *express* provision in favor of the County Court would have been needless, if the Supreme Court had no *inherent* original jurisdiction—the conclusion is that the Supreme Court has inherent, and incidental to its existence, original jurisdiction of every criminal matter, except in cases where the jurisdiction is taken away by Statute.

This construction of the Judiciary Act is supported by various *Statutes*, which recognize a concurrent and general jurisdiction of criminal cases in the Supreme Court.

The first section of the Act for the punishment of inferior crimes, *recognizes* the same jurisdiction, in case of theft, in Supreme as in County Court.

The Act relating to fines, &c, 2 vol. p. 65, sec. 2, provides that in cases originally commenced in the Supreme Court, the fine or penalty shall be paid into the Treasury of the State—if the Supreme Court had no jurisdiction, except in cases *expressly* given by Statute, the Court could not take cognizance of a breach of a penal law, except where the fine or penalty is *expressly* payable to the State Treasury; this section then, was useless, but this section provides that the penalty shall be paid into the State's Treasury by reason of the prosecution being originally commenced in the Supreme Court, it contemplates a class of cases that may be prosecuted in either Court, County or Supreme, and a concurrent jurisdiction in those Courts.

Judgment—Plea insufficient.

No. 7.

UNITED STATES *against* JACOB DAVY ET AL. *Rutland*, 1820.

THE United States can maintain an action of debt, upon *contract*, in the Courts of this State.

THIS was an action of debt, on bond given to secure the payment of internal duties.

Plea—To the jurisdisdiction of the County Court, where the suit was commenced. Demurrer.

For the defendant, it was contended, that the County Courts of the State of Vermont, have no jurisdiction in such cases as this, for that the Act of Congress, giving them jurisdiction is unconstitutional and void.

All causes, arising from the existence of the United States as a government, must be exclusively under the jurisdiction of the United State's Courts. The debts due to the United States are of this nature and the State Courts cannot have concurrent jurisdiction.

By the Constitution of the United States, a Court of the United States can be erected by the Legislature of the general government, but the Judges can be appointed *only* by the President and Senate; by this Act the power of appointing Judges, who have jurisdiction in certain causes of the United States, is given to the Legislature of this State; this is an evasion of the Constitution: if Congress can give jurisdiction to the State Courts in one case, they can in all. Congress are bound to erect Courts for the administration of Justice, to be filled by the President and Senate, and cannot erect *State* Courts into *United States'* Courts. The officers of this State are not accountable to, and the Judges of the State Courts cannot be impeached by, the United States.

In case of a Jury trial, what oath is to be administered? By our oath the Jury are to decide according to the laws of this State; but, in this case, they ought to decide according to the laws of the United States. Cited, Constitution of the United States, Article 3, Section 1 and 2. 1 Statute 17. Mentioned,

a case before the Supreme Court of Maryland, published in Niles' Register, of April, 1817. 1 Wheaton's Rep. 334, 381.

Contra. This is an action of *debt*, and the Court having jurisdiction over the subject matter, are to consider the United States as a person, in law, who can maintain this action.

The object of the Judicial power of the United States, in civil cases, is to take cognizance of such cases, where, by reason of the independent sovereignty of the States, no remedy could be applied, as between citizens of different States; giving jurisdiction to the Courts of the United States, does not take away the power possessed by other Courts. The State Courts have concurrent jurisdiction, in all cases where they had jurisdiction before the establishment of the Constitution of the United States, unless taken away by the Constitution of this or the United States; in all cases, for the recovery of the debts, the State Courts would have had jurisdiction had no United States been erected; the ordinary jurisdiction of the State Courts extend to this case; that jurisdiction is not taken away by the Constitution of the United States; Congress, by the Act of March 3, 1815, by repealing so much of the Act of September 24, 1784, as relates to this case, gave the State Courts a right to take cognizance of the same, and the United States may have their election in which Court to bring their action; suits of this nature have been frequently brought in the State Courts, and in the same instances removed into the Supreme Court of the United States, and this objection never made.

There is difficulty in the trial, as the Constitution and laws of the United States are laws of this State, and our Courts are bound to take cognizance of the same.

By the Court. All the cases from our sister States, where the Courts have decided they have no jurisdiction, are actions brought to enforce the *penal* laws of the United States—no Court has refused the aid of the laws of the State, in collecting a debt due to the United States, founded merely on *contract*.

in such a case the objections to enforcing a penal law of a different government do not exist.

Judgment—That the Court have jurisdiction.

Pierpont, for plaintiff.

Langdon, for defendants.

No. 8.

TREASURER OF WINDSOR COUNTY *against* **JONES ET AL.**
Windsor, 1816.

AN action qui tam, to recover a penalty under the Statute against issuing private bills of credit, may be brought in a County, *other* than where the bills issued.

No. 9.

BARKER *against* **WILLARD.** *Windsor*, 1816.

IN an action on the case, by bail, in a Jail bond against a third person, for forcing the principal out of the limits, the jurisdiction is to be ascertained by the amount *due* on the face of the bond, and not by the amount of penalty.

DECLARATION—In a plea of the case, for that the said Robert, at Woodstock, aforesaid, on the 17th day of August, 1816, became bail, in a Jail bond, to the keeper of the Jail, in said County, in the penalty of $60, for the admission of one John Marsh, to the liberties of the yard, who was imprisoned on an execution in favor of Mower and Ward, for the sum of $31,77, in the whole, dated August 10, 1816, signed by Benjamin Swan, Justice Peace; the said John Marsh being committed to said prison, as aforesaid, and admitted to the liberties of said prison, the said Willard, the defendant, on the 27th day of August, last aforesaid, then and there, well knowing the said John Marsh to be a prisoner within the liberties of the Jail-yard, aforesaid, did wilfully and maliciously force the said Marsh out and over the bounds of said liberties and out of the yard of said Jail, in which the said John was imprisoned, as aforesaid, wherefore, and by reason of all which said

premises the penalty of said bond became absolute, and the said Robert liable to respond the same to the said sheriff, wherefore the said Robert says, that the said Willard, by reason of the premises aforesaid, became liable to him, the said Robert, to pay him the amount of the penalty of said bond, and all damages and costs by said Robert expended, in and about the same; to the damage of plaintiff, one hundred dollars.

Plea—That the cause of action is within the jurisdiction of a Justice of the Peace, and not within the jurisdiction of the County Court.

By the Court. There would not be, in this case, any recovery of a penalty, to be chancered in equity, but the recovery must be of damages, actually sustained by the plaintiff—the declaration furnishes a specific rule of damages, by which the plaintiff is limited. It does not appear, by the declaration, that the damages could possibly exceed the jurisdiction of a Justice.

Judgment—That County Court has not jurisdiction.

JUROR—See New Trial 8, 11, 13.

L.

LANDLORD AND TENANT.

No. 1.

A landlord is not concluded by a Judgment, in Ejectment, against his tenant, by parol lease, he must be joined in the *suit* to be concluded by the *Judgment.*

See Brush v. Cook, Tit. Evidence No. 17.

No. 2.

ROBINSON *against* HATHAWAY. *Franklin*, 1819.

IN an action of ejectment, for non payment of rent, the tenant cannot give in evidence, that the plaintiff derived no title to the land in question, from his grantor, or that said grantor, having the title had parted with the same before deeding to the plaintiff.

ERROR brought to reverse a judgment of Franklin County Court, November term, A. D. 1819.

The original action was, an action of ejectment, brought by lessor against assignee of lessee, for the non-payment of rent.

Plea—Not guilty.

On the trial the defendant acknowledged that he had not paid the rent due on said land, and offered to give in evidence that one Silas Hathaway formerly owned said land, and that he gave a durable lease of said land, reserving annual rent on the same, to one Russell Emery, and afterwards Samuel Hitchcock and Abel Allis levied an execution on said land, in their favor, against said Silas, and that the time of redemption of said Silas had expired, and the interest of said Silas passed into the said Hitchcock and Allis, and after all the title had passed out of said Silas, he deeded, to the plaintiff, said land; and that said Hitchcock and Allis gave said Russell Emery legal notice to pay said rent to them; and afterwards the plaintiff got possession of the lease given by said Silas to said Emery, and after the same was recorded, and that he gave up said lease and gave a lease in his own name, to the said Emery, and the said Emery afterwards deeded said land to defendant, and the defendant was legally notified by those legally holding under the said Hitchcock and Allis, to pay rent to them, and that defendant came into Court to know to whom he should pay said rent, which evidence was rejected by the Court.

Bill of exceptions, filed by defendant, and this writ of error founded thereon—error assigned, was the rejection of the evidence aforesaid.

By the Court. There is no error, the evidence was properly excluded; the tenant could not set up a defence adverse

to the title of his landlord; this defence was, not that plaintiff, the lessor, had parted with his interest to an assignee, but that he had no title from his grantor.

Judgment of the County Court affirmed.

See Ejectment 4. Pleas and Pleadings 6. Tresspass 1.

LEASE—See Tresspass 1.

LEVY.

YOUNG *against* JUDD. *Addison*, 1819.

THIS was an action of ejectment. The plaintiffs title was by levy of an execution against one Dickinson. Plaintiff had attached the whole town of Middlebury, as the property of Dickinson; after the attachment, and before the levy, the defendant purchased the land in question, of Dickinson. The plaintiff then set off, on his execution against Dickinson, the land in question, and brought this action.

In this case, the folowing questions arose:

1. Was the attachment good, and sufficiently descriptive, to hold the land, in question, against subsequent purchasers?

Decided by the Court—That the attachment was good, to hold all the land in the town, owned by Dickinson, as appeared of record, at the time of the attachment.

Objections to the levy:

1. It did not appear, from the officer's return, that a demand had been made on the debtor, to choose an appraiser.

This objection was over-ruled by the Court.

2. Defendant offered to shew that the debtor had land, sufficient to satisfy the execution, without taking the land deeded to the plaintiff.

Decided—That this shewing was properly rojected.

3. That the appraisers had appraised other land, to a larger

amount than the execution; the creditor then abandoned *that* property, and took the land in question.

Decided—This shewing was properly rejected, and the levy established.

See Ejectment 3. Execution 1. Mortgage 1.

LICENCE—See Bail 2.

LIMITATION—See Promissory Note 2, 3. Usury. Prescription.

LIMITS—See Escape 1, 2.

LUNATIC—See Insanity.

MAJORITY IN AGE—See Female.

M.

MALICIOUS PROSECUTION.

HATHAWAY *against* ALLEN. *Franklin*, 1819.

IN an action on the case, for maliciously prosecuting a civil suit, on a note in the name of a third person, the recovery of a Judgment, in the suit complained of, in favor of the creditor, is conclusive evidence of probable cause; the declaration stating such a judgment, although it avers the same was obtained with malice, and full knowledge that there was no cause of action; and, that defendant, as plaintiff's agent, knew the note was paid, is *insufficient*.

A perpetual injunction from Chancery, does not do away the effect of the judgment, as conclusive evidence of probable cause.

THIS was an action on the case. Declaration stated, that defendant, wrongfully and unjustly contriving and intending to imprison and harass the plaintiff, did falsely and maliciously cause a writ of attachment to be issued, from the Circuit Court

of the United States, returnable to May term, A. D. 1814, in the name, and favor of one William Hull, on a note of hand, dated January 16, A. D. 1801, executed by said Silas, for $6000, payable in six months, with interest, directed to the Marshal, &c. demanding damages $14,000; that said note had been, before the praying out of said writ, paid to said Hull, by plaintiff; that said Hull had no claim or demand, or probable cause of action, against the plaintiff, on said note or otherwise; all which was well known to said Heman.

And the said Heman, with full knowledge, &c.* did procure the said writ to be put into the hands of a deputy marshal, and in April, A. D. 1814, caused the said Silas to be arrested, and taken into custody, &c. and caused him to procure bail for his appearance at said Court; and plaintiff was compelled to attend said Court, at great loss, &c. and defendant caused said writ to be entered, plaintiff to procure special bail, and the cause continued to October term, 1814.

And, the defendant did obtain a judgment, in the suit aforesaid, in favor of said William Hull, at said Court, for $10,930,37 damages, and $27,46 costs, well knowing there was no cause of action against the said Silas; and the defendant caused an execution to issue on said judgment, and plaintiff to be committed to prison, and there kept for the term of three years, without any reasonable or probable cause. That plaintiff brought a suit in chancery, against said Hull and Allen, before said Circuit Court, at May term, 1815, to vacate said judgment and perpetually enjoin said execution and judgment, which was entered in said Court, May term, 1815; that, at said term of said Court, he obtained an injunction on said execution, dated May 9, 1815, and caused the same to be served on defendant, before he had caused said Silas to be imprisoned, as aforesaid; that defendant, in defiance of said injunction, caused plaintiff to be imprisoned, as aforesaid; that defendant delayed the

* Every act of defendant, throughout the declaration, is charged, that, "with a wicked and malicious intent, wrongfully and unjustly contriving to imprison, harrass, and injure, did falsely and maliciously," or words of the same import.

decision of said chancery suit, until October term, 1818; that, at October term, 1818, plaintiff obtained a decree, that said note was paid, previous to the commencement of the aforesaid suit, on said note, and a perpetual injunction on said judgment and execution. Plaintiff says, that all said doings of the defendant, were wicked, &c. and intended to ruin said Silas, in reputation and property; that, by reason of the premises, plaintiff suffered great pain in body and mind, his health was greatly injured and impaired, and his life exposed, and he was hindered and molested in his business, especially in several law-suits, by which he lost the demands, to the amount of fifty thousand dollars. Plaintiff avers he expended $5000, in prosecuting his suit in chancery; that he paid large sums of money in his suits, lost by his unlawful imprisonment; that defendant, as agent and servant of the plaintiff, did, in 1805, pay said note to the said William, with the property of the said Silas, and that the said William, did, then and there receive the same, in full satisfaction of said note, and that defendant received said note of said William Hull, to deliver to the said Silas; that defendant had full knowledge of all the facts aforesaid, and that defendant's acts were malicious, and done with a view to oppress, &c. and to extort large sums of money and claims, that plaintiff legally and justly held against said Heman. To the damage of the plaintiff $100,000.

Plea—In bar, recites the execution of the note to Hull, that on the 1st day of March, 1805, the same being unpaid, and still due from said Silas, to said William Hull, the said Hull, for a good and valuable consideration, assigned to said Heman, to his own use and benefit, the said note; that defendant, for the purpose of collecting the said debt, instituted a suit, and prayed out a writ of attachment, returnable to the Circuit Court, May term, 1814, which writ was legally served; that said writ was duly returned to the Circuit Court, May term, 1814, and entered in said Court; that said Hull appeared by his attorney, *C. P. Van Ness*, and said Hathaway by his attorney, *Elnathan Keyes;* and said Hathaway prayed for and obtained a contin-

uance of said cause, to the next term of said Court, at which time the parties appeared, by their attornies, aforesaid; and, said Silas pleaded that he did not assume, &c.

Issue to the Jury, and verdict for plaintiff 10,930 damages, and his costs; and judgment of Court was duly rendered on said verdict, for $10,930 damages, &c. $27,49 costs; that said Heman on the 14th day of October, 1814, prayed out a Ca. Sa. returnable in sixty days, which was returned non est; and, on the 4th of May, 1815, said Heman caused an alias Ca. Sa. to be issued, which was delivered to the Marshal of the Vermont District, who, by virtue of said execution, and long before the injunction, mentioned in plaintiff's declaration, was granted, did arrest and confine the body of said Silas, until the 15th of of May, 1815, when he was admitted to the liberties of the prison, on giving bonds; that said action was not prosecuted maliciously, &c. but for the purpose of collecting a just debt. Demurrer.

For plaintiff, *Royce*: That an action will lie for maliciously prosecuting a civil suit, and holding to bail, without probable cause. 1 Saunders 27, 228. 3 Term 183.

The injury from holding to bail, is the same here as in England, where an oath is necessary, and though the oath is evidence of malice, it does not preclude other evidence; that commencing and prosecuting a civil suit, with intention to imprison and harrass the adverse party, and not to litigate a right, is actionable.

2. The judgment in the Circuit Court may shew probable cause, as to Hull, but the *gist* of this action, is the unfaithfulness of the defendant, as *agent*; and, that he retained the evidence of payment, in his own hands, and thus compelled the plaintiff to suffer the judgment; defendant cannot be protected by that judgment.

Contra. *Van Ness* and *Richardson*, contended: This cannot be called an action, by a principal against, his agent for misconduct, in his agency; the averment, towards the close of the declaration, does not directly alledge the agency, but only in-

troduces the word agent, in the averment of payment; this is an action for maliciously prosecuting a civil suit, and

1. That no action will lie for the malicious prosecution of a civil action, without probable cause. Saville v. Roberts, 1 Sal. 14. Bray v. Patrid, Cro. Eliz. 836. Crokes' James 133–4. 1 Bos. and Pull. 205. 1 Saund. 227. 6 Mod. 73.

2. Admitting that an action lies for the maliciously prosecuting a civil suit, without probably cause, yet, if by the pleadings, it appears there was any, the least cause for the prosecution, the action cannot be sustained, and in this cause the defendant insists that his having recovered a judgment, in the suit complained of, shews a sufficient probable cause; even though the said judgment should be afterwards reversed or set aside. Reynolds v. Kenedy, 1 Wilson 232. Markham v. Pesiod, Cro. James 130. Johnson v. Sutton, 1 Term 493.

3. It is indispensably necessary that the original prosecution should have terminated in favor of the present plaintiff, before the commencement of this action. 2 Esp. N. P. 124. Goddard v. Smith, 1 Sal. 21.

4. The judgment, in the suit complained of, has never been reversed or set aside; the bringing a bill in chancery, was an admission that the proceedings at *law*, were all regular and conformably to law, and the injunction did not operate upon the *judgment*, but solely upon the *person*, by preventing him from proceeding farther with the judgment. 1 Mod. Chan. 108–9. Practical Reg. 250–1. 1 Collectanea Juridica 52, 72, and 59.

An injunctiou protects the party, obtaining it, from any farther proceedings at law; it confers no right, as the *law* will not permit the support of the present action, the *injunction* could not confer the right; a court of *law* cannot punish for disobeying the injunction, but the court of *chancery* only. The decree that the note was paid, does not imply that the action was unfounded, or that Allen was conversant of the payment, or that there was any fraud; the note might have been paid in

equity, and not in *law*, and so no imputation of blame, for proceeding at law.

The plaintiff is presumed to have stated every fact, in his favor; he has not stated that any costs were adjudged against Allen, which shews the court of chancery did consider there was no blame attached to Allen.

5. The plea in bar, is sufficient, as it shews probable cause, by setting up special matter. 2 Esp. N. P. 126. Croke's Eliz. 900, Paine v. Rochester, Croke's Eliz. 871.

Opinion of the Court. It is important to give this action a name, in order to apply it to the principles of law. In an averment that defendant well knew the fact of payment of the note, he is called an agent, and it is attempted to call this action, one against defendant for misconduct as an agent; but the declaration does not shew any authority, given by plaintiff to defendant, or any appointment of defendant as agent, either general or special, or any subject matter of the agency; this is not an action in favor of principal against an agent; it is not an action for maliciously holding to bail. Such an action lies, only when the process is directed to hold to bail, for a sum evidently and unreasonably larger than the plaintiff's real claim. This is an action for maliciously prosecuting a civil suit, without probable cause, and the facts of imprisonment, holding to bail, &c. are alledged by way of aggravation of damages.

It is not necessary to decide, in this case,

1. Whether an action will lie, in this State, for maliciously issuing an attachment and holding to bail, without probable cause; or

2. Whether an action will lie, for maliciously prosecuting a civil suit, without probable cause; for,

In this case, the commencement of the declaration states a fact, which directly contradicts all the averments of want of probable cause; it states that the action in favor of Hull, was founded on a note, and that the want of probable cause, consisted in the payment of the note, the existence of a debt *pri-*

ma facie is admitted, and the fact of payment, Hull or his assignee had a right to contest; the declaration shows not only a palpable, but a sufficient cause of action *prima facie*. The recovery of a judgment, in the suit complained of, is still more conclusive, and all the facts alledged, shewing want of probable cause, were matters of defence, before that judgment was rendered.

The injunction from chancery could not do away the effect of the judgment, as conclusive evidence of probable cause; it is presumed no court would ever render a judgment without even probable cause. Divest the declaration of verbiage, and the great and unusual number of *opprobrious epithets*, heaped upon every act of defendant, and which cannot alter the *nature* of the acts themselves, and it complains of nothing more than may be stated against every party who has brought an action and failed to recover, or having recovered at *law*, is enjoined by a court of *chancery*. The declaration is unprecedented, and cannot be supported by either practice or principle.

Judgment—That declaration is insufficient.

MARRIAGE.

HOLGATE *against* CHENEY. *Chittenden*, 1819.

WHENEVER it is necessary that a minister be certified of consent, according to the Statute, before he proceed to marry a minor, such consent must be of the parent, if either be living.

A master, within the meaning of the Act, cannot be constituted by verbal contract.

THIS was an action of debt, on the Statute, for marrying Charity Bevins, a minor, to John Battis Bazin, without the consent of plaintiff, who claims the penalty of the Statute, as master of said Charity.

Plea—General issue.

On the trial, at June term, 1819, it appeared in evidence, that the defendant, who was an ordained minister of the gospel, settled in Milton, in the county of Chittenden, did, on the 17th day of December, 1816, join the said John and the said Char-

ity in marriage ; that said Charity was a minor, and resided at the time of said marriage, with the plaintiff. It also appeared, in evidence, that the mother of said Charity (the father being dead) agreed with the plaintiff that the said Charity should live with the plaintiff until she arrived at the age of eighteen years, but the agreement was never reduced to writing.

There was no evidence that said plantiff ever gave his consent to the said marriage ; but, there was evidence introduced, that the mother of said Charity is still living, and that the defendant, at the time of said marriage, was informed that the mother had given her consent to said marriage, and that said Charity was not bound to the plaintiff ; and, there was evidence introduced, tending to shew that the mother actually gave her consent to said marriage.

From this statement, the defendant insisted that the *plaintiff* could not maintain this action ; that the right of action, if any, belonged to the mother, and, at any rate, *this* plaintiff had no right to the penalty of the Statute.

The defendant also insisted, that, as he was *certified* of the consent of the mother, as aforesaid, it was immaterial whether the certificate was true or false, provided he supposed it was true.

The Judge charged the Jury, that if they found the mother had agreed with the plaintiff, that the said Charity should live with the plaintiff until she arrived at the age of eighteen years, and that the said agreement was still in force, (the said Charity at the time of the said marriage, living with the plaintiff, and the mother not interfering,) that the plaintiff could maintain this action, and prosecute the same to effect, and that whether she had or had not given her consent.

Verdict for plaintiff, and

Motion for new trial, founded on exceptions to the opinions and charge of the Judge.

In support of the motion, *Van Ness* and *Swift* :

1. That when this action is sustainable, by a *master*, it must be one who is *in loco parentis ;* that the contract between the

mother and the plaintiff, gave the plaintiff no right to the service of the daughter; the mother could not bind the daughter, she having a right to choose her own guardian; and, that a binding, by parol, was void. Reeves' Dom. Rel. 341-2-3-4. 8 Term Rep. 379. 1 Salk. 68. 1 Burns' Jus. 60. 8 John. 328.

2. That if the contract was valid, and there has been a forfeiture of the penalty; yet the *plaintiff* cannot maintain this action. The object of the Statute was not to give a compensation for loss of service, but to secure to the natural relations, that so important a contract, as the marriage of a child, should not be completed without the consent of those most interested in the future welfare of the parties, or if there are no parents, then to those who are in loco parentis. While the *father* is living, the forfeiture is incurred by marrying without *his* consent; if he be dead, the *mother* succeeds to the same rights; all the relations of parent, master, and guardian, may exist at the same time, and the consent of the master cannot be sufficient, when there is a parent.

3. The certificate of the consent of the mother, proved, in this case, is sufficient to save the defendant from the penalty.

4. If this certificate is not sufficient, yet proof of actual consent, is all the Statute requires.

Contra. Farrand and *Allen*: This action may be sustained by any person, standing in the relation of master; the mother was the natural guardian of the infant, (the father being dead,) and had all the rights over her that her father could have, until the Court of Probate should interfere, and appoint a guardian; her verbal contract, binding the child to the plaintiff, was valid. The common law does not require such a contract, to be in *writing*, and we have no Statute on the subject.

2. The action must be brought by the person having the control of the infant, and if there be no *such* person, then by a prochin ami; the Statute intends to give the penalty to the person injured; after the infant is bound to a master, the parent

has no control of the time or service, and is not holden for any misfeasance of the infant.

By the Act to enforce a due observance of the Sabbath, Stat. 1 vol. p. 276, parents, guardians, and masters are liable for the fines, &c. yet it would not be contended, that, after the child was bound out, the parent would be liable for the fine incurred by the minor. As the parent is not entitled to the services, or subjected to the misfeasances of the child, he or she cannot maintain this action for the penalty; the consent of the mother, in this case, cannot protect the defendant; the consent of the master was necessary, and *he only* could bring the present action.

3. If the certificate of the mother's consent, was sufficient to justify the defendant, yet such certificate ought to have been in writing; the Statute intends some higher evidence should be required by the minister, than mere verbal information.

4. It does not appear, from the case, that any actual consent of the mother was given.

By the Court. The object of the 4th section of the Act, (1 vol. 265) regulating marriage and divorce, cannot be, to give a compensation for loss of service; it is very inadequate to that object; the penalty is not proportioned to such an injury; the loss of service may be, in some cases, for a single day, in others, many years, and the penalty is given, in a certain case, to those who are not entitled to the service of the minor, i. e. to the next friends. The object must be, to prevent clandestine marriages; the consent therefore, is required of those whose relative situation, to the minor, is such, that they are presumed to have the greatest interest in preventing an imprudent connexion. Whatever may be the situation of the minor, whether resident in the family of the parent or parents, or bound out as an apprentice, or servant, still the interest of the *parent*, in the marriage of the minor, far exceeds that of the *master*, or any other person. Independent of the anxiety of the parent, for the future welfare of the child, the

pecuniary interest is great and permanent; for, by the 9th section of the Act, concerning "Legal settlement, and providing for the poor," Stat. 1 vol. p. 387, *either* parent is bound to support the *grand-children*, in a certain event.

Whenever it is necessary that the Minister or Justice of the Peace, be certified of consent, before he proceed to join in marriage, any person, such consent must be of the parent, if either be living; if the marriage be celebrated, without such consent, the forfeiture is incurred. In this case, the consent of the mother would have justified the defendant, and the Judge ought so to have directed the Jury.

2. The Court consider that the *master*, within the meaning of the Act, is not *any one* who stands in that relation to the minor; a single day's service, or a mere service, at the will of the minor or his guardian, will create this relation; but, such a master is not within the meaning of this Act; he must be *in loco parentis*, one who has the control of the minor for a certain period; this control, or power, over the minor, cannot be transferred from a parent, by a mere verbal agreement; this was an exception to the effect of verbal agreements, at *common law*, and this principle is perfectly understood by every individual in community; no parent ever considers his child bound for a certain period, to a master, unless the contract be at least *in writing*; a mere verbal contract is always considered to be at the will of either party.

If common law principles are established by the universal consent and practice of a community, the principle which requires a binding to service, to be by something more than a mere *verbal* agreement, is so established.

New trial granted.

MASTER AND SERVANT—See Marriage.

MESNE PROFITS—See Mortgage 4.

MINOR—See Abatement 12. Audita Querela 2. False Imprisonment 3.

MILITARY OFFICER—See False Imprisonment 2, 3. Condemnation.

MORTGAGE.

No. 1.

WILKINSON *against* **LATHROP.** *Rutland*, 1816.

THE estate of a mortgagee may be attached and execution extended thereon. Quere de hoc, How shall it be levied on, before the law day expires.

No. 2.

CATLIN *against* **CHITTENDEN & CO.** *Chittenden*, 1819.

WHERE a conveyance, of land, is made, as *security for a pre-existing debt*, it is a mortgage, whatever may be the words of the condition, and, once a mortgage, it is always a mortgage.

In all cases of mortgage, the mortgagee has a right to collect his debt, independent of the mortgage.

ACTION on book. The case was, that before the commencement of the present action, Giles T. Chittenden executed to the plaintiff a deed of lands, in Burlington, and a deed of lands in Colchester; and, on the execution of said deeds, the said Giles took from the said Guy Catlin, a memorandum, in writing, as follows:

"Received, at Quebec, this 14th day of August, 1816, from Giles T. Chittenden, his two deeds of this date, conveying lands in the towns of Burlington and Colchester. Now, therefore, if the said Giles shall pay, or cause to be paid, to the said Guy Catlin, a certain note, for the sum of six thousand dollars, with the interest thereon; also, the amount due the said Guy Catlin, from the said Giles T. Chittenden & Co. and also pay the said Catlin's expences, and a compensation for his journey

to this place, and also his expenses of sending money to New York, in sixty days from date hereof; then, and in that case, the said Catlin is to release to said Chittenden, the lands abovementioned; but, if the said Chittenden shall neglect or refuse to pay as abovementioned, the deeds, here mentioned, are held by said Catlin, in full payment of the sums abovementioned;" which memorandum was duly recorded.

Upon these facts the Judge directed a verdict for the defendant, and a verdict was returned, that the plaintiff ought to be barred.

Exceptions by plaintiff, and motion for new trial.

Van Ness, in support of the motion, contended:

That the deeds, in this case, were taken to secure pre-existing debts, the execution of the receipt, and the recording the same, gave to the plaintiff only the interest of a mortgagee; the strong words used at the end of the receipt could not destroy the equity of redemption of Chittenden, of course Catlin must have the right to collect his debt.

Contra. Adams: That the reception, by Catlin, of the deeds described in this case, was in full satisfaction of the said Catlin's book account, that although the Chittendens have recorded the memorandum and thereby rendered the deeds defeasable; yet the said Catlin's original demands are not thereby revived.

By the Court. In all cases where the conveyance is a mortgage, the rights of the parties are reciprocal; the mortgagor has a right to redeem, and the mortgagee to collect his debt.

In this case the conveyances and receipt shew that the land was holden by the plaintiff as *security* for a pre-existing debt; as the conveyance was a mortgage in its *origin* it continues a mortgage to the present time; the interest of the plaintiff in the land, is that of a mortgagee, and he has a right to sue for his debt.

New trial not granted.

No. 3.

CLEVELAND *against* CLARK AND FOSTER. *Addison*, 1820.

A mortgagee cannot purchase in a mortgage, on a different piece of land, and tack the same to his own mortgage, after both are forfeited at law, so as to compel the mortgagor to redeem both mortgaged premises or neither.

THIS was an action of ejectment. The declaration contained two counts, describing separate and distinct pieces of land.

Verdict for plaintiff, that defendants are guilty on the first count; and, on the second count, that David Clark is guilty, and Foster not guilty.

The title of the plaintiff was that of a mortgagee, by mortgage from David Clark, of the lands described in the second count, and that of assignee of a mortgage from said David Clark, of the lands described in the first count.

The defendant, Foster, held the lands, described in the first count, by deed from Clark.

At July term, 1819, after judgment, on motion of the defendant, Foster, it was *ordered*, that the writ of possession be stayed till the first Monday of July, 1820, and that defendant, Foster, pay, by that time, the sum now due on the mortgage of said lands described in the first count *only*, with interest, and costs, or &c.

Exceptions were filed, by the plaintiff, to this decree, on the ground that evidence was offered to shew that the deed from Clark to Foster, was fraudulent, which was rejected.

Phelps and *Seymour*, for plaintiff, contended:

1. That, upon proof that the conveyance from Clark to Foster, was fraudulent, Foster could redeem upon such terms only, as Clark might.

2. That, as between plaintiff and Clark, after the forfeiture, plaintiff cannot be compelled to accept a redemption of one piece of land without the other; if either piece be an insufficient security, for the sum charged upon it; that, although in this case, the plaintiff is assignee of one of the mortgages, his rights are the same as if he was the direct mortgagee in both

cases; that the mortgagor's right is gone, at law, and a court of equity will not grant relief, except upon equitable terms; that where both pieces of land are a sufficient security for the whole debt, the court will see that the security is not impaired by a partial redemption.

Contra. D. Chipman: That distinct mortgages, upon different pieces of land, and for distinct debts, cannot be tacked together; that a mortgagee cannot purchase in a mortgage given by the mortgagor, to a third person, and thereby compel the mortgagor to redeem both or neither. Powell on Mort. 392.

That a person who possesses the land, by voluntary conveyance, from mortgagor, may redeem. Powell on Mort. 343.

By the Court. A mortgagee cannot purchase in a mortgage and compel the mortgagor to redeem both or neither, if one piece of land be of more value than the debt charged upon it, the interest of the mortgagor can be taken by his creditors by process of law only; it is not to be subjected to forfeiture for non-payment of other debts, charged upon other lands, and to other creditors.

Decree affirmed.

The defendant then moved, that the time of redemption be extended to one year from this term of the Court.

But, by the Court. The Statute limits the time to one year from rendition of judgment; as judgment was rendered at the fact term, this Court cannot, as a Court of law, extend the time of redemption. See Judiciary Act, Sec. 76, 1 Stat. 84.

No. 4.

STANBURY *against* DEAN. *Rutland*, 1820.

IN an action of *ejectment*, by mortgagee, to recover possession of the mortgaged premises, plaintiff may recover, in damages, the mesne profits, after the expiration of the law day, and after notice to quit.

THIS was an action of ejectment, to recover lands, by virtue of a mortgage deed.

It is agreed, that judgment be entered for the plaintiff, to re-

cover possession of the mortgaged premises, in common form, with one hundred dollars damages, subject to the opinion of the Court, at the law term, whether any more than nominal damages are recoverable in this case; if the Court should be of opinion that, in *any case* of ejectment, on mortgage, more than nominal damages are recoverable, then the judgment aforesaid, to remain, &c.

It was contended, that damages may be recovered for mesne profits, after condition broken; and also, for waste or injury, either before or after condition broken.

Decided by the Court. That after the law day expires, and notice to quit, by mortgagee, he may recover the mesne profits in this action.

The Court did not decide the question, whether damages could be recovered, for waste or injury, either before or after condition broken.

N.

NEW TRIAL.

No. 1.

DURKEE *against* **FESSENDEN.** *Windham*, 1816.

THE refusal of the Judge, at the fact term, to continue the cause, is no ground for a new trial.

An objection to the admission or rejection of testimony, by the Judge, or to his charge, cannot be assigned as cause for a new trial, unless the exceptions are allowed by the Judge, drawn up according to the truth of the case, and presented to him for signature.

Contradictory evidence, by the same witness, at different trials, to a point material, is cause for a new trial, provided the aggrieved party could not shew that fact at the trial.

No. 2.

MILLER *against* WARNER. *Windham*, 1816.

ALTHOUGH it appears from the exceptions allowed and signed by the Judge, that the testimony was improperly admitted, by which a verdict was given for defendant: the Court will not set aside the verdict, provided the action is such as the plaintiff cannot sustain on legal principles.

An action of replevin, cannot be sustained, except under the Statute.

No. 3.

FISK *against* STEEL. *Orange*, 1816.

A new trial will be granted in a case where the Judge of the fact term refused to allow and sign exceptions, provided the cause designated in the exceptions, if allowed and signed, would have been sufficient to induce the Court to set aside the verdict. And a prayer that the exceptions may become a part of the record, is no ground for refusing to allow and sign them.

This was a case where the refusal to sign was not on the ground that the *facts* were not correctly stated.

No. 4.

ANONYMOUS. *Washington*, 1816.

IN an action of trespass, for assault and battery, the Judge rejected evidence, passing to the Jury, which was proper, in mitigation of damages.

This is cause for granting a new trial.

No. 5.

HALL & CO. *against* DOWNS ET AL. *Franklin*, 1816.

WHERE the verdict is manifestly contrary to law, a new trial will be granted.

Any plea, to an action on book, which, in its effects, necessarily puts in issue a fact, to which it is competent for the plaintiff to testify, before auditors, and by which plea the burden of proof is cast on the plaintiff, is bad.

No. 6.

POMEROY ET AL. *against* TAYLOR. *Franklin*, 1816.

THE doings of a former proprietors' meeting, and divisions made in consequence thereof, cannot be legalized, by any vote they may afterwards pass, at a subsequent meeting.

A new trial will not be granted, in an action of ejectment, where the damages are nominal, although a small part of the lands, in dispute, were proved, on the trial, to be in a third person, and the Jury, by mistake, returned a verdict for the whole.

No. 7.

ROGERS *against* PAGE ET AL. *Addison*, 1816.

AN absolute right to a water course, may be acquired by 15 years' uninterrupted possession, use and occupation, claiming right thereto, adverse to all others.

The Court will not grant a new trial, where the equity is strongly in favor of the verdict, although that which is stated, by the Judge, to be the law, and on which the verdict is founded, is doubtful.

No. 8.

STATE *against* SHIPPY. *Rutland*, 1817.

ON a motion for a new trial, where the verdict was against the respondent, on an indictment for perjury, the verdict was set aside, on the ground that one of the Jurors had separated

from his fellows, (unattended by an officer,) after he was sworn, and before verdict.

No. 9.

HURD *against* BARBER. *Bennington*, 1817.

COURT will not, in all cases, refuse to grant a new trial, where the cause stated, is the discovery of new and important testimony, although it is to a point litigated at the trial. The case must, however, be a strong one, to induce the Court to interfere.

No. 10.

BARRETT *against* BARRETT. *Windsor*, 1817.

IN a case where the party had good reason to believe two material witnesses would be present at the trial, and commenced the trial, without moving for a continuance, and it is shewn that one of said witnesses was taken suddenly sick, and the other fractured his leg, and both were thereby prevented attending the Court.

The Court granted a new trial, on terms.

No. 11.

STATE *against* GODFREY. *Windsor*, 1817.

JURORS may not separate, after being sworn, in a capital case.

A person who has *expressed* his opinion, is not a competent Juror. Respondent is permitted to ask a Juror if he has formed his opinion, in order to enable him to decide upon his PEREMPTORY challenges.

New trial granted.

No. 12.

STATE *against* **COX.** *Windsor*, 1817.

A new trial will not be granted, for the discovery of new and material testimony, to a point litigated at the trial, provided the case was a very clear one against the respondent.

No. 13.

CHENEY *against* **HOLGATE.** *Chittenden*, 1819.

AN individual Juror cannot testify to his own misconduct, or that of his fellow Jurors.

Where the Jury had agreed on a verdict for plaintiff, and in ascertaining the amount of damages, each Juror marked a sum, and the whole amount was divided by 12, but the Jury did not return the quotient, as the amount of damages, but deliberated and returned a less sum; no cause for setting aside the verdict.

Where the verdict was sealed, and one of the Jurors is dissatisfied with the verdict, and requests the foreman to ask leave of the Court, to reconsider the verdict, and the foreman promises so to do, but does not ask leave, and the Jury, when called upon, in open Court, assent to the verdict in the usual form, no cause for new trial.

THIS was an action of trespass, for an assault and battery, tried at June term, 1819.

Verdict for plaintiff, and motion for new trial.

This motion prayed for a new trial, on the ground of misconduct of the Jurors. The evidence offered to prove the misconduct, was:

1. Testimony of individual Jurors of the panel.

2. Testimony of the officer who had the charge of the Jury.

The testimony of the officer was: "That the Jury, in estimating the damages to be recovered against the defendant, agreed to make their separate marks of the sum, add the whole together, and divide by twelve. The Jury did so mark and put their respective sums into a hat; when the sums were exhibited I perceived they had marked from 80 up to 1200 dollars, so that the division left the sum of 462 dollars. Some of the Jury were dissatisfied with the sum, and after consulting some time, a motion was made to reduce the sum to 400 dollars, which prevailed; they sealed the verdict, and dispersed; this morning, I met several of the Jurymen against Mr. Brine-

maid's, and on returning, Mr. Mansfield, one of the Jurymen, enquired of me, if there was any possibility to reconsider a verdict, after the same was sealed. I replied, I thought not, unless it was by consent of the Court, upon a representation that the Jury, or some of them, expressed their dissent. When the Jury went into Court, I was sitting by the Jury, when Mr. Catlin, one of the Jury, was conversing with the other Jurors and the foreman, in which they gave the foreman to understand, that they were dissatisfied with the verdict, and requested him to inform the Court, that they were desirous to reconsider the subject, and Mr. Clark, the foreman, promised to make the representation; Mr. Catlin informed the foreman, that he knew there was as many as seven, who united with him in the request."

No request was made by the foreman, or any other Juror, for permission to reconsider the verdict, but the same was assented to, and accepted in common form.

In support of the motion, it was contended:

1. That the affidavits of the Jurors were admissible; that although a Juror could not testify to his own misconduct, he could to that of others. Ferguson v. Morrill, Caledonia County, Supreme Court, February term, 1818, was cited.*

2. That sufficient cause for a new trial, appears in the affidavit of the officer, in this; that the Jury ascertained the sum in damages, in an improper manner, and the foreman deceived the Jury, in promising to lay their request before the Court, and neglecting so to do.

Contra. 1. A Juror cannot be admitted to testify to *any* facts, tending to impeach the verdict of the Jury, neither can any thing, a *Juror* has said, be received in evidence. 1 Chitty on criminal law 450. 1 T. R. 11. 4 Johnson 487. Bos. and Pull. 326. Tidd's Prac. 328. 3 Burr 1696.

2. The officer's affidavit is part hear-say; what the Juror

* Ferguson v. Morrill, Caledonia, 1818. In this case, a motion for new trial was made, founded *solely* on the misconduct of the officer, and affidavits of the Jurors were admitted to prove the conduct of the officer *only*. Reporter.

said to him is not evidence ; the affidavit shews the Jury were not bound by the quotient, found by the division, but reduced the sum so found ; the assent of all the Jurors, in open Court, is conclusive that they finally agreed to the verdict.

By the Court. 1. An individual Juror cannot testify to his own misconduct, or that of his fellow Jurors, tending to impeach the verdict of the Jury, delivered in open Court, and assented to by the whole panel.

2. It does not appear the Jury ascertained the sum in damages, by making and dividing ; they deliberated and fixed upon a sum, in damages, after the division was made ; the assent of all the Jurors, to the verdict, when called upon, for that purpose, in open Court, is conclusive, that they all finally agreed to the verdict ; any individual Juror might have objected, if he thought proper, and it does not appear any one was ignorant of this right.

New trial not granted.

See 2 Tyler. Error 5.

NOTICE.

No. 1.

ADMINISTRATOR OF WALBRIDGE *against* SMITH. *Franklin*, 1816.

IN an action, upon a receipt for property attached, where the liability arises from the property not having been delivered, on demand of an officer holding the execution, other than the officer attaching ; it is material to alledge notice to the receitor, that the execution, issued on the judgment rendered in the suit, is in the hands of the officer demanding the property.

No. 2.

STEWART *against* BARNUM. *Addison*, 1817.

NOTICE given to the maker of a note of hand, by the ori

ginal payee, that the note was endorsed, is sufficient notice, under the Statute, to protect the endorsee against any after payment, or credit made or given, by maker to endorser.

See Judgment 2. Pauper Cases 2.

NOTE—See Promissory Note.

O.

OATH—See Information.

OFF-SET—See Set-Off.

ORDER OF REMOVAL—See Pauper Cases 2, 3.

P.

PARTITION.

POMEROY ET AL *against* TAYLOR. *Franklin*, 1815.

TENANTS in common, who have not perfected their title, by 15 years' possession, under the Statute, may make partition by parol, provided this severance is accompanied by acts of possession, in severalty.

PARTNER—See Evidence 13. Account 2.

PATENT RIGHT.

PARROT *against* FARNSWORTH. *Windsor*, 1817.

IN an action of assumpsit, on a note of hand, the defendant may avoid the note, by shewing in evidence, under the general issue, that the note was given for a pretended patent right,

which was void, on the ground of its not having been an original invention; although a deed, with covenant, was made by plaintiff to defendant, conveying the patent right, and although the patent remains unrepealed.

PAUPER CASES.

No. 1.

TOWN OF PAWLET *against* TOWN OF RUTLAND.

Rutland, 1818.

A town, in which a Jail is situated, may recover the expence of supporting a pauper, in such prison, of the town where he was last legally settled.

ERROR brought to reverse a judgment of Rutland County Court.

The original case, was an action of Indebitatus assumpsit, brought by Rutland against Pawlet, to recover money, paid in supporting a transient person, belonging to Pawlet, under the 11th section of the Act concerning legal settlement and providing for the poor, 1 Stat. 388.

The declaration did not alledge that the person provided for was poor and unable to respond.

On the trial, in the County Court, it appeared that the person provided for, was a prisoner, confined in Jail, in the town of Rutland, on civil process; that, being in need of relief, he was supported by the town of Rutland as a pauper, and that his place of legal settlement, at the time, was in Pawlet.

The County Court charged the Jury, the plaintiff was entitled to recover.

Verdict and Judgment for the plaintiff.

Decided by the Court. That there is no error.

1. The omission to state in the declaration, that the person provided for, was unable to defray the expence, is not fatal, after verdict.

2. A person, brought from one town, and confined in Jail in another, is a transient person, within the meaning of the Act; and, his imprisonment is a *disability and confinement*, within

the spirit of the 11th section of the Act; and the town where the Jail is situated, may, under the said 11th section, recover the expence, incurred in support of such pauper, of the town where he was last legally settled. 2 Mass. 547, 564. 5 Do. 244.

No. 2.

OVERSEERS OF THE POOR OF FAIRFIELD
against
OVERSEERS OF THE POOR OF ST. ALBANS. *Franklin*, 1820.

AN order of removal, unappealed from, is not conclusive, that the pauper was settled in the town, to which the pauper was ordered to remove; if such town had no notice of the order.

A general notice and demand of the sum expended in supporting the pauper, is not sufficient notice of the order of removal.

THIS was an action of assumpsit, for money, &c. expended in providing for one Schuyler Chicester, a pauper, in his last sickness; and the last legal settlement of the pauper was alledged to be in the town of St. Albans.

Plea—General issue.

Verdict for plaintiffs.

Bill of exceptions filed as follows:

On the trial, to prove the settlement of the pauper, in St. Albans, plaintiffs offered the record of the court of examination and their order unappealed from, which was objected to by defendants, as an exparte proceeding, from which they could have no appeal.

The Judge decided: That in case the plaintiffs should prove that the defendants had received fifteen days' notice, in writing, agreeable to the 4th section of the Act directing the mode of proceeding, that the defendants might have appealed, and they would in such case, be concluded by the record. Record admitted.

To prove notice to the defendants, the plaintiffs offered the following, viz:

"*State of Vermont, Fairfield, Sept.* 19, 1816.

"To, &c. Select men and Overseers of the poor of the town of St. Albans, Greeting:

"*Gentlemen*—You are hereby notified that we have expended, for the maintenance, &c. the sum of $267,98, for Schuyler Chichester, a stranger, whose last legal settlement was in the town of St. Albans, who died in this town, in February last, and who could not be removed, after he became chargeable, without endangering life, which sum you are hereby requested to pay, immediately, to —— treasurer of the town of Fairfield.

"Signed, &c. Select men and Overseers of the poor of Fairfield."

Defendants objected, on several grounds; one that the notice did not contain, or mention, the *order of removal.*

The Judge decided, the notice sufficient.

By the Court. The order of removal, unappealed from, is not conclusive, as an adjudication, that the pauper was settled in St. Albans, unless St. Albans had been notified of such order, so that they could have appealed. In this case, the notice was not sufficient to render the order conclusive; no notice was given, that an *order of removal* had been made; nor could St. Albans infer that an order had been made, from the demand of money, as Fairfield might have demanded and recovered the money, without any order of removal.

New trial granted.

No. 3.

OVERSEERS OF THE POOR OF ST. ALBANS
against
OVERSEERS OF THE POOR OF GEORGIA. *Franklin*, 1818.

A town which maintains a poor stranger, so dangerously sick, that he cannot be removed, without endangering life, may recover the amount of necessary expenditure, of the town where the pauper was last legally settled, without having obtained an order of removal.

THE plaintiffs declared, in a plea of the case, for that, whereas, one James Goodwin, on the 14th day of October, 1811, be-

ing a stranger in St. Albans, and whose last place of legal settlement, was in said town of Georgia, was taken dangerously sick, in said town of St. Albans, and could not be removed to said town of Georgia, without endangering his life; of which the said overseers of the poor, of said town of Georgia, on the same day and year, last aforesaid, had notice. And, whereas, the said town of Georgia, neglected to provide for the cure and maintenance of said Goodwin, and, said town of St. Albans, was at great expense, in procuring assistance and necessaries, for the said Goodwin, during his sickness, and before he could be removed to said town of Georgia, to wit, the sum of $57,44, of which the overseers of Georgia, on the 28th day of June, 1813, had legal notice, in writing.

Plea—Non assumpsit.

On the trial, at June term, 1817, the defendants objected:

1. That the plaintiffs could not recover, without first shewing an *order of removal.*

2. That no evidence could be given, to prove any sum expended for said Goodwin, over five dollars, unless the same had been expended under an order from a Justice Peace.

Both objections were over-ruled by the Judge.

Verdict for plaintiff; and motion for new trial, founded on exceptions to the opinions of the Judge.

Opinion of the Court. That this case comes under the 4th section of the Act concerning legal settlement, and providing for the poor, 1 Stat. p. 385; the words "such stranger," in the 4th section, refer to the "stranger who shall have come to reside in such town or place, and has not gained a legal settlement therein;" and not to the poor stranger, on whom an order has been made. It would not be a rational construction of the Act, that a town should be compelled to order the removal of a pauper, who cannot be actually removed, or even examined, touching his ability and last place of legal settlement.

2. On the second point, the Court consider the order of the

Justice has no concern with the claim of the town, sued for in this action, and the objection was properly over-ruled.

Motion dismissed.

New trial not granted.

No. 4.

HOLMES *against* OVERSEERS OF ST. ALBANS. *Franklin*, 1818.

WHERE a prisoner, having a legal settlement in this State, in the town of R, is confined in Jail, on civil process, in the town of S, and is poor, and in need of relief, and the Jailer represents the situation of the prisoner, to the overseers of the poor of the town of S, and demands of them to provide for the prisoner, and the overseers refuse, and the Jailer, residing with his family, in the Jail-house, provides for the support of the prisoner, he may recover the expense of such support, of said overseers.

CASE stated. Ebenezer Blanchard, of Rutland, in the County of Rutland, and having a legal settlement in said Rutland, was, on the 25th day of November, 1818, arrested, in Swanton, in Franklin County, where he had resided for four months, by virtue of a writ of execution; and, by virtue of said writ, on the day and year last aforesaid, duly committed to the keeper of the Jail, in St. Albans, in Franklin County, within said prison; that at the time of the commitment, the said Ebenezer Blanchard was, and ever hath been poor and in need of relief, and confined in said prison, he being poor, and wholly unable to support himself, in whole, or in part; that, on the said 25th day of November, 1818, and ever since, Sheveric Holmes, the plaintiff, in this case, was, and is Sheriff, within and for the County of Franklin, by virtue of his said office, keeper of said prison; the said Sheveric Holmes, then being Sheriff and keeper of said prison, did represent the situation of the said Ebenezer Blanchard, to the overseers of the poor of St. Albans, and demanded of the overseers of the poor, as aforesaid, to provide for the support of the said Ebenezer Blanchard; the said overseers then and there refused, and ever since have refused, to provide for the support of said Ebenezer Blanchard; that said Holmes did, from the time last aforesaid, until the 22d day of December, 1818, reside with his family, in said Jail-

house; and did, during the time aforesaid, provide for the support of said Ebenezer Blanchard.

The question, for the opinion of the Court, is whether, from the facts stated, the said Sheveric Holmes, is entitled, by law, to recover of, and from the overseers of the poor of St. Albans, for the support of said Blanchard, as aforesaid.

Judgment—That the overseers are liable, and that plaintiff recover, &c.

No. 5.

TOWN OF IRA *against* TOWN OF CLARENDON.

Rutland, 1820.

WHERE a person came to reside in the town of I, and was legally warned to depart said town, and afterwards did depart said town, and reside in the town of C, and there gained a settlement; and, afterwards returned to the town of I, and there resided one year, without being warned. Held, that the warning aforesaid, prevented the person warned, from gaining a settlement by the second residence.

THIS was a writ of error, brought to reverse the Judgment of Rutland County Court.

The case was, an order of removal of two paupers, made in favor of the town of Ira, upon the town of Clarendon.

On the trial, in the County Court, the town of Ira offered the record of the warning of one of the paupers, in June, 1804, and of both, in February, 1808.

These were objected to, inasmuch as it appeared, from the evidence, that the paupers had subsequently departed from said town, and gained a settlement in Clarendon; and, after having gained a settlement in Clarendon, had removed to Ira, and there resided a year, without being warned; and, therefore, the testimony was immaterial and irrelevant.

The Court rejected the testimony, and a verdict was returned for Clarendon.

Ira filed their bill of exceptions, and brought this writ of error.

By the Court. The question is, whether a warning, agreeably to the Statute, 1 vol. p. 400, prevents the person warned,

from gaining a settlement, by the residence immediately following the warning *only;* or whether the effects of the warning extend to *all* subsequent, though distinct periods of residence.

The Court consider there is a material difference between the English Statute and ours, on this subject. The English Statute merely gives a settlement, by residence one year, without being warned, but does not express the effect of such warning.

Our Legislature has undertaken, expressly to declare the *effect* of the warning, and must be presumed to have expressed their intentions explicitly, and to intend something *more*, than would be inferred from mere silence. They intended to make a difference between our Statute and the English.

The 2d section of the Act, does not limit the effect of the warning to the *present* residence of the person warned, but expressly declares, that the person warned "shall not be deemed and adjudged to have gained a legal settlement *in such town*, unless such person or persons is or are discharged from such warning, by a vote of such town," &c.

This section was wholly unnecessary, for the purpose of preventing a settlement, under the residence, immediately following the warning; it must have been intended to vary our Statute from the English so as to extend the effect of the warning to *all* subsequent, though distinct periods of residence.

Judgment—There is error; that the Judgment of the County Court be reversed; and,

Judgment—That the pauper was duly removed—Chief Justice Chace dissenting.

No. 6.

CASTLETON *against* CLARENDON. *Rutland*, 1820.

THE omission of the words "with my return thereon," in the service of a warning to depart a town, renders the warning illegal.

THIS was an appeal from an order of removal of Hester

William, wife of Cato Williams, made in favor of the town of Castleton against the town of Clarendon; the case was determined upon the question whether the pauper had gained a settlement in Castleton. It appeared from the case that said Cato Williams moved to said Castleton, in March, 1811, with his wife, and there resided until the summer of 1813; that on the 6th day of January, 1812, said Cato was warned to depart said Castleton, in the following manner:

STATE OF VERMONT, } To Ebenezer Langdon, first Constable
Rutland County, ss. } of Castleton, GREETING:

You are hereby required to summon Cato Williams, now residing in Castleton, to depart said town, &c.

Castleton, Jan. 6, 1812.

Then served this precept by leaving a true and attested copy of the same, lying on the table of the last and usual place of abode of the within named Cato Williams.

Attest, EBENEZER LANGDON,
First Constable.

From these facts it was contended, that the said Cato had gained a settlement for himself and family in Castleton; that the warning was defective.

1. That the Select men did not sign the warning as Select men of Castleton.

2. The service and return of the officer was not made conformable to law; the return omits the words "with my return thereon," which are necessary. 1 Stat. 62.

By the Court. The return of the officer is defective; the pauper was not legally warned.

Judgment—That the pauper was unduly removed.

No. 7.

MOUNT HOLLY *against* PANTON. *Rutland*, 1820.

A warning to depart a town must be recorded before the end of the year's residence of the person warned.

THIS was an appeal from an order of removal. The pau-

per had resided more than one year in the town of Panton, had been warned within the year, but the warning, &c. was not *recorded* within the year.

Decided—That the warning must be recorded before the end of the year of the pauper's residence. At the end of the year the pauper has either gained a settlement or not; after the expiration of the year nothing can be done to alter the relative situation of the town with other towns, and it is important that other towns should be enabled *then* to ascertain the facts by the records.

No. 8.

MIDDLEBURY *against* **HUBBARDTON.** *Addison*, 1817.

WARNING under the Statute, to the father and parents, is not sufficient to protect the town against the maintenance of a poor child who has resided in the town more than one year after arriving of full age, and not himself warned.

No. 9.

PITTSFORD *against* **BRANDON.** *Rutland*, 1819.

THE question in this case was, whether the time, when the warning was, by the officer serving the same, returned to the Town Clerk, could be proved by parol.

By the Court. As the evidence of this fact is not required to be a matter of record, it may be proved by parol.

No. 10.

BRANDON *against* **PITTSFORD.** *Rutland*, 1819.

THE officer's return on the warning must state the particular situation in which the copy was left—after the expiration of the year the officer serving the warning cannot amend his return.

ORDER for the removal of Joshua Leclave, May 30, 1817.

On the trial of this cause at September term, 1818, the over-

seers of the poor of Pittsford offered in evidence a warning dated the eleventh day of March, 1816, which was served on the 13th day of the same March, and within one year after the said Leclave moved into the said town of Pittsford; the return stated the service to be "by leaving a true and attested copy at the last place of abode," without specifying the particular situation in which the copy was left.

To the admission of this evidence the overseers of the poor of the town of Brandon objected, and the evidence was excluded by the Judge.

Thereupon, the overseers of the poor of the town of Pittsford moved, that Jonathan Dike, Jr. the constable who served the said warning, might be permitted to amend his return so made as aforesaid, but the Court over-ruled the said motion and refused to permit the said Dike to amend his return.

Verdict for the town of Brandon.

Motion for new trial by the counsel for the town of Pittsford, founded on exceptions to the decisions of the Judge.

In support of the motion, *Newell* and *Williams* contended:

1. That the omission in the return was not fatal.

2. That the service having been made in *fact* conformable to the Statute, the officer ought to have been permitted to amend the return, if it was defective. 11 Mass. 477.

Contra. *Langdon* 1. That the defect in the return was fatal.

2. That by the Statute the warning and service thereof, must be recorded, which constitutes the evidence of a vested right, and cannot be amended after record thereof. 1 Bac. Ab. 167–8.

The Court decided, that after the expiration of one year of the pauper's residence, the officer could not be permitted to amend his return, and confirmed the decision of the Judge.

The motion for new trial was dismissed.

No. 11.

POULTNEY *against* FAIR-HAVEN. *Rutland*, 1819.

A person, residing in a town *previous* to the Act of 1801, and *continuing to reside* in the town *after* the passing of the Act, may gain a settlement under *that* Act.

In case of an order for removal of husband and wife, as paupers, and on the trial the husband testifies that he was lawfully married to the woman, she cannot be admitted to testify that she had a former husband living, nor can that fact be proved by reputation.

APPEAL from an order of Justices for the removal of John Slyter and wife, from the town of Poultney to the town of Fair-Haven.

On the trial of the issue, whether duly or unduly removed, at September term, 1818, it was proved that *Jacob Slyter*, the father of *John*, moved into the town of Fair-Haven, in February, 1801, and there resided a number of years, without being warned out; that John Slyter, the pauper, was then 19 years old; testimony was given to the Jury that John Slyter, the pauper, absconded from Fair-Haven, in December, 1801, and had not returned until he was brought back by the order of removal.

John Slyter swore that he was lawfully married to Asenath Slyter, the person removed as his wife.

The town of Fair-Haven then offered Asenath Slyter to prove that previous to the time, when it was alledged she had married Slyter, she was lawfully married to one Amasa Austin, who is now alive, which testimony was rejected by the Judge.

The town of Fair-Haven then offered to prove her marriage with Austin, by reputation, and cohabitation with him as his wife, and that Austin was yet alive, which testimony was rejected by the Judge.

The Judge charged the Jury, that the said Jacob Slyter, by removing, as aforesaid, into the town of Fair-Haven, in February, 1801, and there residing a number of years next after the 6th day of November, 1801, without being warned out agreeably to the provisions of the Statute in that behalf, thereby gained a settlement for himself and family; and also, that it would make no difference, as it respected the settlement of John Slyter, the pauper, whether he went away in December,

1801, or not, as his settlement would still follow the settlement of his father; and, if his father gained a settlement during the minority of the son, as aforesaid, he also gained one for John Slyter, unless said John had gained one for himself.

Verdict for the town of Poultney.

Motion for new trial, by the town of Fair-Haven, founded on exceptions to the decisions and charge of the Judge.

In support of the motion, *Langdon* and *Williams* contended:

1. That the Act in relation to settlements passed November 1801, has no effect upon those who were already in town, but only on those who should *thereafter* come into any town, &c. 4 Burr 2057, 6 T. R. 330. Bur. Set. Cases 509–25. Selwyn N. P. 19.

2. That Asenath Slyter, so called, was a competent witness to prove her marriage with Amasa Austin; the town of Fair-Haven had a right to her testimony, and could not be deprived of it by the town of Poultney, first calling on John Slyter, her supposed husband.

3. Evidence of her marriage with Austin, by reputation, ought to have been received, as it is admissible testimony, in all cases, except two, viz: Prosecution for Bigamy, and actions of Crim. Con. Swift's Evidence 140.

By the Court. Asenath being *prima facie* the wife of John Slyter, it was necessary a previous *legal* marriage should be proved to shew she was not his *legal* wife—cohabitation with Austin, though sufficient to charge him, was not proper evidence to *disprove* her the wife of Slyter.

The Court confirmed the decisions of the Judge, and the motion for a new trial was dismissed.

No. 12.

CASTLETON *against* **CLARENDON.** *Rutland, 1819.*

ERROR. The County Court had dismissed the complaint

of the overseers of Castleton, because it was signed by one overseer only.

The Court reversed the decision of the County Court and decided that the signature of one overseer of the poor to the complaint, was sufficient.

No. 13.

BENSON *against* WEST-HAVEN, Ap't. *Rutland*, 1819.

A minor, bound out as an apprentice, does not gain a settlement, by his residence with his master, but his settlement follows that of his father.

THIS was an appeal from an order for removing Robert Sharp, a pauper, from the town of Benson to the town of West-Haven.

The counsel for Benson relied on the following point, to wit: That Robert Sharp, by the indentures executed by his father Abraham Sharp, on the 28th day of February, 1811, to Reuben Wilkinson, of said West-Haven, and going and living with said Reuben as one of his family, in West-Haven, aforesaid, for more than one year, till he was twenty-one years of age, thereby became emancipated from his father's family, and acquired a settlement for himself, in said West-Haven. 5 Term Rep. 670. 2 Bur. Set. Cases 287. 1 Strange 438–9.

Contra. That the pauper gained no settlement, while residing in West-Haven, under the indentures of apprenticeship.

Settlement in Vermont, as well as in England, must be gained by express Statute; those who are embraced in the words of the Statute, "coming and residing in any town," &c. must be those who are de facto or de lege, independent of others and acting for themselves.

That an apprenticeship is not, by any legal principle, to be considered as emancipation, but on the other hand, a continuance of servitude, imposed by parental authority. 3 Term Rep. 356. 6 T. R. 247. Strange 438, 834.

The Court decided—That the pauper did not gain a settle-

ment, by his residence with his master, under the indenture of apprenticeship, but that his residence followed that of his father.

Judgment—That the pauper was unduly removed.

No. 14.

RICHMOND *against* **MILTON.** *Chittenden*, 1818.

IN this case the Court decided, that all pleas on motions, founded on the irregularity of the proceedings, should be first tried as dilatory pleas are, in other cases, and the *merits* of the case, on the issue, whether duly or unduly removed, involving the question, where the pauper was last legally settled, might be tried by *Jury trial.*

No. 15.

TOWN OF WASHINGTON *against* **RISING.** *Orange*, 1818.

IN Error. In this case the Court decided, that overseers of the poor might, as agents for their town, make contracts for the support of the poor of their town, so as to bind to the fulfilment of such contract; and that, where there are three overseers and one was requested, by another, to take charge of a particular pauper, his contract for the support of *such* pauper, was binding on the town.

PAYMENT—See Tender 1, 2.

PENALTY.

DENTON AND SMITH *against* **CROOK.** *Addison*, 1820.

ACTION of debt to recover the penalty for receiving a fraudulent conveyance of lands, with intent to defraud the plaintiffs of their debt.

Motion to dismiss, for want of a minute of the true day, month, and year, when the same was exhibited and signed.

By the Court. The decision of this Court, previous to the passing of the Act of Nov. 10, 1808, explanatory of the Statute of limitations, was, that this case came within the first section of the Statute of limitations, and the Statute of 1808, expressly excepts this case out of that section. To carry the intention of the Act into effect, the 5th section of the Statute of limitation does not extend to this case, and no minute of the true day, &c. is necessary.

Motion over-ruled.

See Marriage.

PLEAS AND PLEADINGS.

No. 1.

JONES *against* AMES. *Rutland*, 1816.

A Judgment rendered against the defendant, who was out of the State, and had no notice of the suit, cannot be over-hauled by *plea*, in an action brought on that judgment: The *only* remedy is by writ of review, brought by the defendant within three years, agreeable to the provisions of the Statute.

No. 2.

SWIFT *against* HAMBLIN. *Bennington*, 1816.

IN an action of Indebitatus assumpsit, the defendant pleaded a judgment rendered in trover, for the same cause of action, and averred that such proceedings were had therein, that defendant recovered his costs. Held bad on demurrer, for that it does not appear, by the plea in bar, that the merits were tried.

No. 3.

SQUIRE *against* ALLEN. *Bennington*, 1817.

A declaration against the defendant, as receiver, held good, on error, where the plea, below, was general demurrer, though it was not averred, in the declaration, of whom the defendant received, &c. This was a case of joint partners in tanning, &c.

No. 4.

GLEASON *against* HOWARD. *Windham*, 1817.

IN an action of trespass quare clausum fregit, if the defendant attempt to justify, under a special plea of title and possession, he must aver every material fact necessary to constitute a title. An averment that the title, &c. was in another on the *fifteenth* day of, &c. and that he attached, &c. on the *sixteenth* day of same month, does not connect the title of the other and himself. An averment that the execution was levied, &c. is bad, unless it appears the execution was in full life. An averment, that by reason whereof, (alluding to the prior statement of the levy of the execution, &c.) the defendant became seized and possessed, in his own right, &c. is argumentative and bad pleading, unless the prior averment will necessarily warrant the conclusion of seizen and possession, i. e. unless they are such as to give title and possession. An averment, in the plea that defendant was seized and possessed, &c. at the time when the trespass is alledged to have been committed, will not avail, in case there are two counts in the declaration, and trespasses in each, alledged to have been committed at different times.

Query. Does not this special plea amount to the general issue, and therefore bad?

No. 5.

GALLUP *against* BURNELL. *Windsor*, 1817.

WHERE there are mutual and divers covenants between the parties, and to be performed alternately, or at different times, they are considered independent and the plaintiff need not alledge performance on his part; not so, if all the plaintiff's covenants were to have been performed, prior to the performance by defendant.

No. 6.

TUCKER *against* STARKS AND BELL. *Franklin*, 1818.

A motion to dismiss, made by a tenant, for not joining his landlord in an action of ejectment against him (the tenant) cannot be made, except according to the rules of pleading in abatement.

No. 7.

PHELPS *against* MOTT. *Franklin*, 1819.

SCIRE Facias to County Court, on judgment of a Justice Peace, under the Statute, must set out facts sufficient to shew it comes within the provisions of the Statute.

SCIRE Facias, in common form, brought to the County Court of Grand-Isle County, on a judgment rendered on confession, by a Justice of the Peace, for $150 damages.

Plea—That an execution issued and was returned satisfied.

Replication—That the execution was, by mistake, levied on property not the debtor's. Demurrer.

By the Court. A Scire Facias can be brought to that Court only in which the judgment was rendered and where the record is, but the Statute directing the mode of levying executions, sec. 9, 1 vol. 327, gives a remedy by *Scire Facias* to the County Court, on a judgment rendered by a Justice, over fourteen dollars, in one case only, where an execution has issued and been levied, by mistake, on property not the debtor's. The

Scire Facias, in such case, must set forth facts sufficient to shew it comes within the provisions of the Statute. In this case, the declaration, in common form, gave the County Court no jurisdiction over the subject matter, and is clearly bad.

Judgment—Declaration insufficient.

No. 8.

FARNSWORTH *against* NASON. *Franklin*, 1819.

WHERE, in an action of assumpsit, there is a special count on a promise to do or perform some collateral act, *such count* ought to alledge a breach of the promise.

Every special count must contain, in itself, all the averments necessary to shew a cause of action.

ERROR. This writ was brought to reverse a judgment of Franklin County Court, November term, 1819, in favor of John Nason, against Samuel H. Farnsworth.

The plaintiff below, Nason, declared in a plea of the case, for that whereas, at a County Court, holden at St. Albans, aforesaid, on the last Monday of January, 1814, the President, &c. of the Vermont State Bank, recovered a judgment in their favor, against one John Curtis and one William Foot, for the sum of $398,36 damages, and also costs, from which judgment the said Curtis and Foot appealed to the Supreme Court, December term, 1814, and upon that occasion one Orange Ferris, of St. Albans, aforesaid, with, and as surety for, the said Curtis, became recognized in the sum of $500, for said appeal, in due form; and whereas, the action aforesaid, was by appeal, as aforesaid, duly entered in said Supreme Court, and whereas the plaintiff afterwards, to wit, on the 29th day of December, 1814, executed his bond, at the request of said Curtis, to the said Ferris, conditioned that the said Ferris should be indemnified and saved harmless from all loss, cost, or trouble, on account of his having so become recognized, as aforesaid; and whereas, the said President and Directors, at the Supreme Court, June term, 1816, recovered final judgment in the suit aforesaid, against the said Curtis, (Foot being then dead;) and

whereas the said Orange Ferris became liable, and was compelled, to pay the said President and Directors, on his recognizance aforesaid, the sum of $390; and whereas the said Ferris had thereupon called on the plaintiff, on account of the bond so executed, by the plaintiff, to him, as aforesaid, and requested to be indemnified in that behalf; and whereas the plaintiff had, on or about the 25th day of September, 1816, applied to the said Curtis, and requested him to secure the plaintiff in that behalf, by reason whereof the said Curtis afterwards, at St. Albans aforesaid, on the 30th day of September, 1816, for and in behalf of the plaintiff, and to secure the plaintiff in that behalf, from eventual loss and damage, and with the knowledge and consent of the said Farnsworth, and at his request, conveyed to the said Farnsworth divers large tracts of lands, lying and being in the towns of St. Albans and Georgia, of a large value, to wit, $5000; now the plaintiff avers that the said defendant afterwards, to wit, at St. Albans aforesaid, on the same 30th day of September, 1816, in consideration of the estates so conveyed to him, by the said Curtis, as aforesaid, at the request of the defendant as aforesaid, and for the purpose aforesaid, assumed upon himself, and to the plaintiff faithfully promised, to indemnify and save harmless the plaintiff from all loss, cost, or damage, arising to the plaintiff by reason of his so having executed said bond of indemnity to the said Ferris, as aforesaid.

2d Count. Money paid.

3d. For lands sold.

4th. Money had and received.

Conclusion. Yet the defendant, his said several promises aforesaid, not regarding, hath never indemnified and saved harmless the plaintiff, on account of the bond aforesaid, but so to do hath ever refused, and still doth refuse, though thereto requested; but, on the contrary thereof, the plaintiff hath been prosecuted to final judgment and execution, by the said Ferris, on said bond; and said Ferris hath recovered and collected

of the plaintiff the sum of four hundred, sixty-four dollars, 98 cents, besides officer's fees on said execution, $6,42; and the plaintiff hath been compelled to expend large sums of money in defending against the suit of said Perris, in that behalf, to wit, $100, of all which, defendant afterwards, to wit, at St. Albans aforesaid, on the first day of November, 1818, had notice, nor hath defendant ever paid to the plaintiff the said sum of money, or any part thereof, but, &c. Ad damnum $800.

Demurrer, as to first count.

General issue, as to the other three counts.

Judgment of County Court, that the first count in plaitiff's declaration is sufficient.

Error assigned. The insufficiency of the said first count—and judgment thereon.

By the Court. The first count in the plaintiff's declaration is clearly insufficient. When there is a special count, on a promise to pay money, and general counts, a general breach is sufficient, but where the special count is on a promise to do or perform any other act, such count ought to alledge a breach of the contract. 1 Chitty's Pl. 326.

But, it is not necessary to decide this to be an indispensable requisite. The first count declares on a promise to indemnify, but does not alledge that plaintiff was ever damnified; every special count must contain all the averments necessary to shew a cause of action; this count does not state any notice to defendant, of plaintiff's loss, or that he had sustained any loss or damage; and it shews no claim or cause of action against defendant.

Judgment—There is error, and that Judgment of County Court be reversed.

Before the Court proceeded to render such Judgment upon the record, certified to this Court, as the County Court ought to have rendered, the defendant in error, moved to amend his declaration; leave was granted upon payment of all back costs.

No. 9.

BURTON *against* BOSTWICK AND FERRIS. *Franklin*, 1819.

ACTION of assumpsit for goods sold and delivered to A and B, as partners under the firm of A, non est as to A. B pleads *in bar* that the said A and B were not partners, that they were not doing business under the firm of A, nor was any credit given to A and B, at their request, but to said A *only*, at his request *only*. Plea held bad on demurrer.

THIS was an action of *indebitatus assumpsit*.

1st Count. For goods sold and delivered.

2d Count. Money paid.

3d Count. Money had and received.

The defendants were charged as partners under the firm of Andrew Bostwick, and the writ returned *non est* as to Bostwick.

Plea of Ferris, *in bar*. That the said Jonathan and Andrew were not joint partners in trade; that they were not doing or transacting any business in the name or firm of Andrew Bostwick, nor was any credit given to the said Jonathan and Andrew, or at their request, but to the said Andrew *only*, and at his request *only*. Demurrer.

By the Court. The plea is nothing more than a denial of the declaration; it traverses facts necessary to be proved by the plaintiff on the general issue, and the plea is tantamount to the general issue, and therefore, insufficient.

No. 10.

PARKHILL *against* PARKHILL, EXECUTOR. *Rutland*, 1820.

WHERE a claim, on *book*, is allowed by commissioners on an insolvent estate, an objection by an *heir*, and an appeal prosecuted by the creditor; the heir is allowed, in the name of the executor, to file a declaration, in Supreme Court, on *note*, against the creditor prosecuting the appeal.

THIS was an appeal from commissioners on an insolvent estate, prosecuted by the creditor, Jesse Parkhill, on the objection of an heir and creditor, agreeably to the Act of 1817. Acts of 1817, p. 90.

Jesse Parkhill had a demand, on book, allowed by the commissioners, to which the heir and creditor objected, &c.

And now, the heir and creditor make the following motion:

1. For leave to file a declaration, on three notes, in favor of the estate, against the said Jesse.

2. For an order to compel Jesse Parkhill to appear and plead to said declaration.

3. For leave to plead the amount, due on said notes, in offsett, to the claim of the said Jesse, on book.

The Court permitted the declaration to be filed.

Note. I have not minutes sufficient to ascertain whether any farther decision was made. Reporter.

See Audita Querela 4. Bond. Bail 2. Covenant. Ex. and Ad. 13. False Imprisonment 4. High Bailiff. Jurisdiction 1. New Trial 5. Pauper Cases 14.

PLEDGE.

ADAMS *against* CLARK. *Rutland*, 1829.

A requests B to endorse for him, to the bank of T, for $2000, and in order to secure B, procures C to sign a note with him, payable to B, for the sum of $2000, and delivers the note to B. Afterwards, A wishes B to endorse again, for him, to the bank of T, for $2000. B endorses, and A pledges the same note, as security, for the second endorsement: On C's being enquired of, by B, whether A had a right thus to pledge the note, he replied, that he was liable, on the note, to B, and that A might thus pledge it. Afterwards, A procures B to endorse, for him, a blank note, which A fills up, to the Farmer's Bank, for $2000, and pays the note to the bank of T, the said note signed by A and C, still remaining in the hands of B; B is compelled to pay the last note to the Farmer's Bank.

Held—That the note, signed by A and C, in the hands of B, was a continued guarantee to the amount of the same, and remained as security generally, for any sum A might procure of B, or by means of B's name, as surety, to the amount of $2000.

THIS was an action on a note.

Plea—Non assumpsit.

On the trial, at September term, 1819, the evidence was: Stephen D. Clark, on the 16th day of November, 1816, wished to obtain money, at the banks of Troy, and procured plaintiff to endorse for him, for the sum of two thousand dollars, and to secure the plaintiff, procured Elijah Clark, the other defendant, to execute the note, on which this action is brought, and left it with the plaintiff; that on or about the 16th day of

January, 1817, the said Stephen wished the plaintiff to endorse again, for him, at the bank of Troy, for two thousand dollars, which plaintiff did, and the first note was taken up; on being enquired of, by plaintiff, what security he would give, he said, "you have my brother's note, as your security," and that he should probably want other renewals, and the note of his brother should remain as security; that Elijah, on being enquired of, before the second note given at the bank of Troy, became payable, whether Stephen had a right to pledge the note, for the second accommodation, then obtained at the bank of Troy, replied that he was liable on the *note*, to the plaintiff, and that Stephen might thus pledge it; that afterwards, and before the second note became payable, and a few days before March 17, 1817, Stephen again requested the plaintiff to endorse for him, plaintiff signed a blank note, and Stephen filled it up with a note, payable at the Farmer's Bank, for the same sum of two thousand dollars, dated March 17, 1817, which was discounted at the time the second note became payable, at the Troy bank, and that note was taken up. Plaintiff has been compelled to pay the note given to the Farmer's Bank.

The Judge charged the Jury—That, as the note on which the plaintiff has brought his action, was executed and delivered to him, by Elijah Clark, to indemnify the plaintiff against his endorsing a note for Stephen D. Clark, to the bank of Troy, for $2000, on which said Stephen D. Clark obtained that sum; that when Stephen D. Clark paid and took up the note, so endorsed, by plaintiff, to the bank, the note in question, so lodged as security, became inoperative, and would not extend, as security, to a subsequent endorsement, of another note, for Stephen D. Clark, on which plaintiff had been damnified, unless Elijah Clark had given new effect to the note, so lodged with plaintiff, by agreeing or consenting that the same should continue as a security or indemnity to the plaintiff, against such subsequent endorsement.

Verdict for defendant, and motion for new trial, founded on exceptions to the charge of the Judge.

In support of the motion, for the plaintiff, it was contended; That the note, on which the action was brought, was a guarantee, not only for the first endorsement, but for the subsequent endorsements of other notes, which operated as a payment, or procured the means of payment, upon the responsibility of the plaintiff, in nature of a continued guarantee. Maule et al. v. Wells, 2 Campbell 413. Mason v. Pritchard, Do. 436. 12 East. 227.

Contra. For defendants: That the note, in question, was delivered, for the sole purpose of indemnifying the plaintiff, against the indorsement which the plaintiff made for Stephen D. Clark. The rights of the plaintiff, and the liability of the defendants, were precisely the same as they would have been, had the defendants, without any note, entered into a contract to indemnify the plaintiff against said endorsement. The payment of the note, thus endorsed, would, in either case, discharge the defendants from any liability to the plaintiff, on the note, or on the contract; and, in this case, the defendants could no more be holden on this note, in consequence of a further endorsement, by the plaintiff, for said Stephen D. without the assent of Elijah Clark, than they would in case of such contract as aforesaid, without a renewal of the same, or in other words, without a new contract, in relation to such farther endorsement.

Opinion of the Court. The Court consider, from the evidence, in this case, taken together, especially from the fact that Stephen D. Clark was permitted, by Elijah Clark, to have the possession and control of the note, in the first instance, and the fact that, after the second endorsement, by plaintiff, and pledge of the note, by Stephen D. Clark, Elijah Clark admitted to the plaintiff his liability on the *note generally*, and the right of Stephen D. Clark to pledge the note, as he had done; that the note, in the hands of the plaintiff, was a *continued guarantee*, to the amount of the note, and remained as security generally, for any sums Stephen D. Clark might procure of the

plaintiff, or by means of plaintiff's name, as surety, to the amount of two thousand dollars; and that, for this purpose, it was not necessary that Elijah Clark should give any new effect to the note, by expressing his agreement or consent, but that, in order to prevent such continuing effect, of the deposit of the note, with the plaintiff, *as aforesaid*, Elijah Clark must have expressed his dissent, and refused to permit the note to continue, as a security, or indemnity to the plaintiff, against any farther endorsement.

New trial granted—Judge Doolittle dissenting.

Langdon, *Williams*, *Mallary*, and *Lathrop*, for plaintiff.

Kellog, *Smith*, and *Chipman*, for defendants.

POOR DEBTOR.

No. 1.

ADAMS *against* MATTOCKS. *Chittenden*, 1815.

THE citation must be served on a creditor, if within this State, though no agent is appointed, on the execution, in the county where the debtor resides, and the Jailer is liable for an escape, if the defect appears, on the face of the certificate lodged with him.

No. 2.

THORNTON *against* ROBINSON AND HOWARD. *Franklin*, 1819.

IN an action on Jail bond, against the bail, the certificate of a Judge and Justice, that the principal ought to be discharged, having taken the poor debtor's oath, is conclusive and constitutes a good defence.

THIS was an action on a Jail bond, and the plaintiff was a resident of Burlington, in this State.

Plea—That Ephraim Robinson, the principal, was discharged, under the Act relating to Jails and Jailers, and for the relief of persons imprisoned therein; the proceedings of the Justices were set forth, in the plea, and it appeared the cita-

tion was served, by leaving a true and attested copy, in the hands of the plaintiff's attorney, Alvan Foote, Esq. at his office, in Burlington, because the said Ariel Thornton was not to be found.

The certificates were regular.

For the plaintiff, *Farrand* contended: That a Court of Jail delivery cannot act, except its process be regular; in this case, the citation ought to have been served on Thornton, personally, and the citation not being so served, the certificates cannot avail the defendants.

Contra. Aldis: That the proceedings were regular, and that the certificates of the Court, that Robinson was legally discharged, are conclusive. 3 Cranch 302.

By the Court. The certificates of the Justices are conclusive, in an action against the Sheriff, or on the Jail bond, against the bail.

Judgment—That the plea is sufficient.

See 2 Tyler 221, 358. Chip. Rep. 14.

No. 3.

SMITH ET AL. *against* QUINTON. *Rutland*, 1818.

THIS was an action on Jail bond, for escape of A. M'Farland, the principal.

Plea—That M'Farland procured a certificate, from a Judge and Justice, that he had taken the poor debtor's oath, &c.

Replication—That the certificate was obtained by the *fraud* of M'Farland, and the Court of Jail delivery.

The Court adjudged the replication insufficient, that the proceedings, being regular on the face of them, was sufficient to discharge the Jailer or bail.

No. 4.

STANIFORD *against* BARRY. *Chittenden*, 1818.

A debtor, confined in the limits, and admitted to the poor debtor's oath, must cause a

certificate to be lodged with, or delivered to the Jailer, before he leave the limits, or his departure will be a breach of the bond.

ACTION on Jail bond.

Plea—Taht the the debtor, who was confined in the limits, had been admitted to the poor debtor's oath, and that the Justices had adjudged that he ought to be discharged. Demurrer.

Decided—That the plea is insufficient; the Statute makes necessary, to the discharge of the prisoner, that a certificate should be made out, by the Justices, and lodged with, or delivered to the keeper of the Jail, 1 Stat. 288, and a departure from the limits, before the delivery of such certificate, is a breach of the bond.

PRACTICE—See Abatement 8, 10. Error 3. Appeal 2.

PRESCRIPTION.

No. 1.

HURLBUT *against* LEONARD. *Rutland*, 1816.

TWENTY years' quiet enjoyment, of flowing the adjoining lands, by the waters of a mill-pond, shall secure the right, by prescription, or rather afford the presumption of a grant of the easement.

No. 2.

ROGERS *against* PAGE ET AL. *Addison*, 1817.

AN absolute right, to a water course, may be acquired, by 15 years' uninterrupted possession, use, and occupation, claiming right, thereto, adverse to all others.

No. 3.

HURLBUT *against* LEONARD. *Rutland*, 1818.

IN an action, on the case, for erecting a dam across a stream

of water, in Orwell, by which the plaintiff's lands, described in his declaration, were flowed. On the trial, upon the issue of not guilty, the Judge charged the Jury, that, if they should be convinced, from the evidence, that the dam, across said stream, by means of which, the plaintiff's land had been overflowed, had been erected and conntined for more than 15 years, to the height it was, at the time of the commencement of the plaintiff's action, the Jury ought to find a verdict for defendant. And also, that the Jury, in said cause, having returned into Court, not agreed upon a verdict, some of the Jurors requested of the Court to be informed. whether, by law, the fifteen years should be considered to begin to run, from the erection of the dam, to its uniform height, or from the time when the plaintiff received, or suffered, actual damages to his lands. Whereupon the Court instructed the Jury, that, the fifteen years would begin to run, from the time of the erection and completion of the dam.

Verdict for defendant, and motion for new trial, founded on exceptions to the charge of the Judge.

The Court decided, that the fifteen years ought to be computed, commencing at the time when the plaintiff's lands were first flowed, or received actual injury.

New trial granted—Judge Doolittle dissenting.

See New Trial 7.

PROBABLE CAUSE—See Malicious Prosecution.

PROBATE—See Abatement 4. Ex. and Ad. 3, 6, 9.

PROMISSORY NOTE.

No. 1.

ELLIS *against* KELLY. *Windham*, 1817.

A negotiable note may be sued, in any town, where the endorsee resides, although it is admitted, by demurrer, to the

plea in abatement, that the note was given, for goods, sold, in another town, than where the payor and payee, both resided, when the contract was made; it appearing from the plea that their residence is still the same.

No. 2.

MEED *against* ELLIS. *Windsor*, 1817.

A note, payable in specific, or collateral articles, is a promissory note, under the Statute of limitations, and is not, (if witnessed,) barred, till fourteen years.

No. 3.

LEONARD *against* WALKER. *Addison*, 1820.

A declaration, describing a note, without any consideration expressed in the note, but describing a consideration, distinct from the note itself, sets forth a note within the Statute of limitations.

PLAINTIFF declares, that, whereas, heretofore, to wit, on the 30th day of October, 1810, at Whiting, in the County of Addison, the said Walker was indebted to the plaintiff, in the sum of $58,72, for fees, legally accruing to the plaintiff, as sheriff's deputy, from the defendant, on a certain execution, in favor of the Vermont State Bank, against the said defendant, Lyman Clark, and Stephen Clark; in consideration thereof, the said defendant, to wit, at Whiting, aforesaid, on the same day and year, last aforesaid, to secure the plaintiff, the payment of the said sum of $58,72, made, executed, and delivered, to the plaintiff, his, the defendant's promissory note, subscribed with the proper hand of the defendant, whereby the defendant promised to pay the plaintiff the sum of $58,72, when he should be thereto requested. Yet, &c.

2d count. Parol promise, of the same description.

Plea—General issue, and non assumpsit, infra sex annos.

Replication—That defendant made and signed his promissory note, above declared upon, at, &c. and, that one Daniel

Washburn, then and there subscribed his name, as a witness. Demurrer and Joinder.

Judgment of the Court. The question is, whether the declaration sets forth a promissory note, within the meaning of the Statute of limitations. 2 Stat. 408, sec. 8.

The Court consider, a promissory note is sufficiently set forth, although the consideration set up, is distinct from the note itself, and although the note itself does not express any consideration.

Replication sufficient.

No. 4.

LEWIS *against* HOLLY ET AL. *Addison*, 1820.

A. is indebted to B. on a negotiable note, B. is indebted to C. in a larger amount, and proposes to secure C. by mortgage of land, on which D. has a prior mortgage. B. and C. apply to A. who promises to pay the amount, due on his note, in favor of B. to D. on his mortgage; whereupon, C. gives farther time to B. and accepts the security proposed; afterwards, B. endorses the note to E. bona fide, E. having no notice of the agreement between A., B., and C. A. does not pay to D. until after the note falls due, and after notice from E.

Held, that the *liability* to C. so long as it continued, is a good defence, against a suit on the note, in favor of either B. or E.

THIS was an action, on a negotiable note, executed by the defendants, to one Spalding Russell, and by him endorsed to plaintiff.

On the trial, at July term, 1819, the defendant offered to give, in evidence, the testimony of Mr. Seymour, as follows:

"Some time in the month of July, or August, 1816, Mr. Haight called on me, with a demand, in favor of Thomas Skelding & Co. of Troy, against Spaulding Russell, of Shoreham, amounting to 2100, or 2200 dollars, and wished me to assist in securing the debt; I went, with said Haight, to Shoreham, and called on said Russell, (who then had a store of goods, in Shoreham, and personal property, on which Skelding & Co. could have secured their demand,) and requested security, and informed him, if it was not given, we should secure the debt, by attachment. Russell informed us, he would secure the

debt, by mortgage of his farm, which was then encumbered, with a mortgage, to Samuel Hunt, on which was due, about seven hundred dollars, but, that he had made provision for the payment of that mortgage, by way of Samuel H. Holley, against whom, and his brother, John D. Holly, he held notes to that amount, and that Holly was to pay the money over to Hunt, in discharge of that mortgage: We agreed to take security, on that farm, provided Holly would agree to pay the Hunt mortgage; we accordingly went, with Russell, to see Holly; we found him riding away, the subject was named to him, he said that Russell held a note against him, and that there would be five, or six, hundred dollars due Russell, but there was an account between him and Russell, on which something was due to him, which must be deducted from those notes, that he could not then stay to adjust it; Russell wished Holly to engage to pay to Hunt, on his mortgage, the amount due on his notes, so that he could make to Skelding & Co. security on that farm, and agreed that, *that* should be considered payment to him on the notes; Holly engaged that he would pay to Hunt, except the balance that might be deducted. It was then agreed that Holly should pay to Hunt, to be applied in discharge of Hunt's mortgage, (reserving the balance that might be due on settlement,) the amount of notes Russel held against him; and upon Holly's promising that the balance to be deducted should not reduce the note more than a certain sum, I think forty dollars, and promising to pay the remainder to Hunt on Hunt's mortgage; Skelding & Co. agreed to take a mortgage of the farm, from Russell, and give him time of payment, and accordingly did take the mortgage; Holly paid to Hunt $580,50, being the amount due on the note Russell held against him; he borrowed the money of Skelding & Co. to enable him to do this, and gave Skelding & Co. his receipt for the same. Hunt sued his mortgage, and took a decree, for the balance due, after deducting what Holly had paid him. Skelding & Co. paid the sum, contained in the decree, to the Clerk of the Court, and foreclosed his mortgage, against Russell, on which was due,

1st January, 1818, $2353,76, and sold the farm for $2000. Notice was given, by Lewis, to Holly, March 29, 1817, and before payment, by Holly, to Hunt."

This evidence was objected to, by the plaintiff, and admitted by the Judge.

Verdict for defendant, and motion for new trial, founded on exceptions to the opinion of the Judge.

In support of the motion, it was contended: That the agreement was to pay the *note*, and implies that the note was to be delivered to Skelding & Co. and to be paid to them, in case they held the note; the promise did not attach to them, unless they procured the note; as a promise to accept a bill of exchange, is not binding, unless a bill be actually drawn and presented; the moment Holly found that neither Skelding & Co. or Hunt, held the note, he was exonerated from the agreement, and stood accountable to any bona fide holder of the note.

2. As the agreement was, to pay the *note*, if it was not paid, when it fell due, the agreement was at an end.

3. Skelding & Co. leaving the note, in the possession of Russell, was a gross fraud upon innocent endorsees.

Contra. That the plaintiff received the note from Russell, subject to all equitable defences, existing at the time of the transfer, as against Russell. In this State, an endorsee takes every note, upon the credit of the endorser, and upon his alone.

2. The contract, given in evidence, as made between Holly, the defendant, Russell, and Skelding & Co. was a valid contract, in law, binding upon Russell and the defendant, and is therefore a good defence to the action. It is binding upon Russell, for the creditors, Skelding & Co. forbearing to sue, and giving time to Russell, upon the security offered, was a sufficient consideration to support his undertaking; it was binding upon the defendant, for the same reason. If Holly was bound, by his undertaking, to Skelding Co. it constituted a valid defence, against Russell, before the endorsement of the note, in question, and, of course, against Lewis, afterwards.

3. It is contended, that possession of the note, by Russell,

after the agreement, in question, was fraudulent, as against Lewis; we answer, this was not a general assignment, but the property and interest, in the note, remained in Russell, subject to the contract; this possession affords no presumption, that there was no off-sett, nor that the payee has not drawn on the maker, for the amount, nor that there has been no agreement, subsequent to the date of the note, as to the mode of payment; there was no person to whom Russell could deliver the note; Skelding & Co. were not to receive the money, and Hunt had no interest in the note or agreement.

Opinion of the Court. 1. The agreement between Holly, Russell, and Skelding & Co. was not predicated upon any supposed transfer of the note, but upon a distinct consideration; by this contract, Holly agreed to pay a certain sum, he owed to Russell, on this note, to Hunt, to apply on his mortgage, and by this agreement of Holly, Skelding & Co. were induced to give further time of payment, and accept security, which they otherwise would not have accepted; the promise was for their benefit.

2. This contract could not be discharged, without the consent of Skelding & Co. or actual payment to Hunt, on his mortgage, either by Russell, or defendant; non-payment, according to the terms of the note, could not put an end to the agreement, or discharge Holly from his liability to Skelding & Co.

3. While this liability, to Skelding & Co. existed, no action could be maintained, on the note, by Russell; and, as this *liability*, alone, constituted a good defence, against Russell, it would, also, against an endorsee.

4. The possession of the note, by Russell, could not, in this case, be considered a fraud, in Skelding & Co. upon endorsees, the sum due on the note was not ascertained, and the money was not to be paid to Skelding & Co.

Judgment—For defendants.

See Discharge 1, 2, 3. Evidence 4, 14. Ex. and Ad. 10. Notice 2. Town Treasurer. Patent Right. Pledge. Trustee Action.

PROPRIETORS—See Division 3. New Trial 6.

PUBLIC LANDS—See Ejectment 7.

PUBLIC OFFICER—See Evidence 17. Information.

PURCHASER.

No. 1.

HOY *against* WRIGHT ET AL. *Washington*, 1817.

A conveyance from A. to B. fraudulent and void, as against creditors, shall not defeat the title of a subsequent bona fide purchaser, without notice of the fraud.

IN this case, the President, Directors, & Co. of the Vermont State Bank, attached the whole township of Montpelier, as the property of Gove, and others, and sold the Store, in question, to the plaintiff, as the property of Gove, on the execution; prior to the attachment, Gove had deeded the store to one Langdon, which conveyance was probably fraudulent, and afterwards, and before the levy of the execution, Langdon had deeded to Gove, and Gove had deeded to defendants who were bona fide purchasers.

The Court decided, the attachment of a whole township, though good, to hold the property which was *apparently* the property of Gove, was not notice to the defendants that the plaintiffs intended to contest the right of *Langdon*, to this particular piece of property, to wit, the store in question; nor would the conveyance of Langdon to Gove, *after* the attachment, as aforesaid, enure to the benefit of the attaching creditor; although, if Gove had sold the store to the President, &c. and afterwards purchased it of Langdon, Gove, and all per-

sons claiming under him might be estopped from contesting the title of the President, &c.

NOTE—Furnished by NATHANIEL CHIPMAN, Esq. In this case Wright contracted with *Langdon* for the purchase, but it was agreed that Langdon should release to Gove and then Gove convey to Wright, so that Gove was a mere *instrument*, as will appear by the case.

No. 2.

ATWATER *against* SEYMOUR. *Addison*, 1818.

WHERE A. mortgages land to B. and the debt is paid as it falls due, but the mortgage is not discharged on record, and afterwards A. mortgages to C.: A. and B. then *fraudulently* procure a foreclosure of the mortgage to B. so that B.'s title on record appears fair; afterwards D. purchases *bona fide* under the title of B.

Held—That D. shall hold the land against C.

CASE stated. James Seamen, being seized in fee, on the 11th day of April, 1809, sold, and by deed of that date legally authenticated, to which reference is to be had for description of the premises, conveyed to Lyman Clark and Russell Clark a certain piece or parcel of land, in Middlebury, in the county of Addison, and for the purchase money, the consideration thereof, the said L. & R. Clark, made to said Seamen their two several notes of hand of the same date, payable in horses, to be delivered in Hubbardton, one note payable on the first day of October (then) next, October, 1806, the other payable on the 20th day of May, 1807, and as collateral security, the said Clarks executed to Seaman a mortgage deed of the premises, of the same date, conditioned to be void on the payment of said note, according to the tenor of the same respectively, which mortgage deed was at the same time legally authenticated by acknowledgement and record; the said notes were regularly paid as they fell due, and were taken up by said Clarks and cancelled, but the mortgage was not cancelled or any discharge thereupon made or given: On the 31st of August, A. D. 1807, the said Clarks by an absolute deed conveyed the same property to Jeremiah Atwater, the present plaintiff, for the consideration, as expressed, of twelve hundred dollars, but which was intended as security for a less sum, before that time lent and

advanced to the said Clarks by the said plaintiff, said last mentioned deed was at the same time duly acknowledged and recorded: On the first day of August, 1809, the plaintiff executed a writing to said Clarks thereby acknowledging that said deed was given for securing the re-payment of the money so lent by him to the said Clarks, being the sum of seven hundred dollars, and promising on the re-payment of the same with interest, on the first day of January (then) next, to reconvey the premises to the said Clark; no part of said sum was paid. The plaintiff's deed, by reason of the said writing given to the Clarks, as aforesaid, being considered in the nature of a mortgage, at the January term of the Supreme Court for Addison County, 1810, he filed a bill in Chancery to foreclose the equity of redemption thereon, and obtained a decree of foreclosure, if the money found due should not be paid by the first day of June, 1811; the money was not paid and the decree of foreclosure took effect.

Soon after the purchase by the Clarks of Seaman, in 1806, Jesse Spencer took the premises and went to reside thereon, and Lyman Clark resided with him in his (Spencer's) family, so long as he the said Lyman resided in Middlebury.

On the 19th day of December, A. D. 1810, said James Seamen by deed of that date conveyed all his right, title and interest in the premises to the said Spencer, expressed to be for the consideration of eighteen hundred dollars, but in fact for some small or no consideration paid by Spencer, who had also a personal knowledge of the full payment made as aforesaid, by the Clarks to the said Seaman, as well as of Atwater's claim; this last mentioned deed from Seaman to Spencer was acknowledged but not then recorded.

At the term of the Supreme Court for Addison County, January, 1811, a bill was filed in Seaman's name against the Clarks, to foreclose their mortgage to Seaman, and a decree obtained for a foreclosure, if the money, which on the shewing appeared to be still due, should not be paid by the second Monday of January, 1812.

The money was not paid, and accordingly the foreclosure took effect against the Clarks.

After said decree, on the 23d January, 1811, the deed from Seaman to Spencer, as aforesaid, was recorded in the proper office.

To shew a sum due on Seaman's mortgage, a note was produced to the Court, in the hand writing of Lyman Clark, one of the mortgagors, of the same tenor and date with one of the notes so paid and taken up, as before stated.

Sometime in the year 1810, Lyman Clark went from Middlebury to reside elsewhere, leaving the said Jesse Spencer in possession of the premises; nor has either the said Lyman Clark or Russell Clark had, since that time, any concern in the premises, the said Spencer acting as the owner; and others holding or claiming under him, continued in the undisturbed possession of the premises, until the death of Spencer, which happened some time in the month of ——, 1816, and before the plaintiff's action.

On the 23d day of February, 1814, Horatio Seymour, one of the defendants, without any notice of the payment made by the Clarks to Seaman, on his mortgage, or of any fraud or collusion between the said Spencer, Seaman, and Clark, or any of them, in that respect, *bona fide* and for a valuable consideration of three hundred and sixty-eight dollars, by him therefor paid to Spencer, in his life time, purchased of him, the said Spencer, and Spencer, by good deed of conveyance well authenticated, sold and conveyed to him, said Seymour, all that part of the premises described in the plaintiff's declaration, and not disclaimed by the plea; by virtue of which said last mentioned conveyance, he, the said Seymour, entered into possession thereof, and ever since hath continued in peacable possession thereof.

Although the said Seymour had no knowledge of the payment of Seaman's mortgage, he knew of the plaintiff's deed from Lyman and Russell Clark.

Now if the Court be of opinion that the plaintiff ought, in

law, to recover, Judgment to be entered for plaintiff, otherwise, Judgment for defendant.

For the plaintiff it was contended by *Starr* and *D. Chipman*, That on payment of the notes, the legal interest of Seaman was at an end, and that a title under a mortgage is liable to be defeated, by shewing payment of the debt for which the land was mortgaged, and the Court will presume that an old mortgage is paid. Powell on Mortgages 138. 2 Burr 979.

True it is, that on record there appeared to be a good title in Seaman, but the Court are not bound to consider the record conclusive, but may set aside any deed, though intermediate for fraud.

As the mortgage to Seaman was paid, he had no interest and could convey none to Spencer, consequently nothing passed to defendant Seymour.

Under the Statute of Elizabeth, a bona fide purchaser without notice of fraud, may obtain a better title than the seller had, but such purchaser is saved by the *proviso* to the English Statute in favor of bona fide purchasers, without notice of fraud.

Our Statute has no such proviso, or saving clause, in favor of such bona fide purchasers.

Our Legislature intended to make our Statute different from the British, and to be more severe against fraud.

Our Statute has declared the fraudulent conveyance *void*, and the Court are not at liberty to vary it, or to supply a proviso by construction.

A subsequent conveyance cannot be valid without an express proviso in the Statute.

The fraud is extrinsic, and from its *nature* must be unknown to the purchaser. He, therefore, must run the risque of such frauds.

The plaintiff had no means to compel a discharge of the mortgage to Seaman.

Contra. For defendant *Phelps* and *N. Chipman*: The mortgage from Clark to Seamen was originally bona fide, but the foreclosure fraudulent.

There is no distinction between a fraudulent foreclosure and a fraudulent conveyance.

The defendant as *bona fide* purchaser, without notice, can hold against the plaintiff. If the purchaser has no notice he is not affected by the fraud.

In Great Britain mortgages are a mere pocket security for money, even, generally, a mere chattel interest; they have no mode of recording to caution purchasers.

Our Statute has provided a system of recording that saves the notoriety of livery of seizin. A *mortgage* must be made notorious in the same manner as *other deeds*.

It is the duty of the vendee to see that the deeds to the vendor are recorded; and the creditor ought to pursue the property while in the hands of fraudulent grantee. Our whole Statute recognizes the principle that such purchases as ours are valid, as it has made provision to secure the grantee against them. As the grantee can compel an acknowledgement of a deed, so a mortgagor may compel a discharge of the mortgage by the mortgagee, and it is the business of the purchaser from the mortgagor to see that such discharge is entered on record. It is the very object of this recording to secure him against a subsequent act of the mortgagee.

The British Statute stands distinct by itself and has two objects, to set aside fraudulent conveyances, and protect bona fide purchasers.

Our Statute is connected with the Statute providing for notoriety of conveyances by *recording*, the object of which is to provide a safe, easy, and notorious mode of conveying real estate.

Neglect in registering a conveyance operates as a fraud on an innocent second purchaser, and the person so neglecting shall be punished with the loss of his interest.

The plaintiff took his deed with full knowledge of the mortgage to Seaman, and it was his duty to see it cancelled, that *he* might be safe, and that *others* might not be deceived.

When defendant purchased there was every appearance of a good title, and he had no means of knowing to the contrary.

The Court are at liberty to adopt our construction of the Statute. It is only by construction that the first deed on record shall hold, where there is a prior deed, but recorded afterwards.

Opinion of the Court. The title which Seymour purchased from Spencer was, on record, a complete title, and he could not be affected by the latent fraud, but the plaintiff's suffering that title to stand an apparent good title on record, operated as a fraud upon strangers, and he shall suffer the consequence of his own neglect. A Judgment for the plaintiff would open the door to greater frauds than the Statute was intended to prevent, as a purchaser might permit an apparent good title to stand upon the record until it passed to bona fide purchasers and then defeat it, and so destroy the benefit of the recording system. A purchaser could never, by any diligence, be safe.

Judgment—That defendant is not guilty.

Q.

QUI TAM—See Jurisdiction 8. Abatement 10.

R.

RECEIPTOR—See Notice 1.

RECOGNIZANCE.

ANONYMOUS. *Caledonia*, 1816.

ACTION of debt lies on a *recognizance* taken by a Judge, (according to the Statute,) on issuing an audita querela, though the recognizance had not been returned into Court.

See Forfeiture 2. Jurisdiction 1.

REFEREES.

No. 1.

JEWELL *against* CATLIN. *Franklin*, 1816.

THIS cause had been referred, and at this time a report of the referees, in favor of the plaintiff, was offered for acceptance.

Defendant excepted on the ground of the insufficiency of the declaration.

The Court over-ruled the exception and rendered Judgment on the report.

No. 2.

KEELER *against* BEERS. *Chittenden*, 1818.

REPORT of referees offered for acceptance.

Exceptions—That the report was founded on mistake of the referees as to the principles of law, and that the referees had refused to order an assignment which was equitable.

The Court decided, that they would not hear any exceptions to the report, other than such as shewed partial and corrupt conduct in the referees.

The report was accepted and Judgment rendered thereon: See Executors and Administrators 11.

RELEASE—See Distribution 3.

REPLEVIN.

No. 1.

TAGGART *against* HART. *Windham*, 1816.

AN action of replevin cannot be sustained as an adversary suit, to wit, to try the right of property.

No. 2.

RALSTON *against* STRONG. *Windsor*, 1816.

A writ of replevin to replevy property attached, issued to and served by a constable is *void*.

See Bond. New Trial 2.

REVIEW—See Appeal 1. Bail 5. Forfeiture 2.

REVOCATION—See Bail 2. Will.

SALE AND DELIVERY.

EVARTS AND BUTLER *against* BUTLER ET AL. *Franklin*, 1819.

ß A sale of lumber lying in Missisque river, at different places, and an agreement by the purchaser to receive the lumber as it lies in the river, is an executed contract, and no other delivery is necessary to transfer the property to the vendee.

The destruction of part of the property, by strangers, after such sale, does not excuse the purchaser from the payment.

WRIT of Error, founded on bill of exceptions allowed by the Judges of Franklin County Court.

The defendant in error, (plaintiffs below) declared in assumpsit: That whereas the said plaintiffs, on the 16th day of October, 1816, owned a large quantity of white pine masts and bowsprits, to wit, forty-one, then lying in Missisque river in the towns of Highgate and Swanton, in said County of Franklin, marked H. X. and the said defendants, at St. Albans, on the day and year last aforesaid, purchased of the plaintiffs the said forty-one sticks of white pine masts and bowsprits, as they lay in Missisque river, and promised to pay the said plaintiffs therefor the sum of twelve dollars and fifty cents, for each stick of said timber, excepting such sticks (if any there were) that were, at the time of making said contract, broken and rendered unfit for market, by geting on the rocks or otherwise rendered unfit for market, to be paid to the said plaintiffs or either of them, at the dwelling house of the said Roswell But-

ler, in St. Albans, on the first day of September, 1817; averment that said forty-one sticks were unbroken, &c.

2d count, for goods sold and delivered.

Plea—Non assumpsit.

Verdict and Judgment for plaintiffs.

On the trial the defendants contended, that, by the contract set forth in the declaration, the defendants were liable to pay for no more timber than they actually received, and offered evidence to show that they received but ten sticks of the timber mentioned in the contract. This evidence was excluded by the Court.

The defendants then offered to shew, that, in the spring of 1817, before the timber was received by the defendants, a share of said timber was destroyed by certain persons, without the privity or consent of the defendants. This evidence was excluded by the Court.

The defendants were permitted to shew the quality and quantity of the timber which plaintiffs had in the river, at the time of the contract, and that instead of forty-one sticks there were but ten sticks which they could have received.

Errors assigned:

1. Insufficiency of the declaration.
2. The exclusion of the evidence.

For the plaintiff in error, *Royce* contended: That the contract declared on, was executory to buy and receive at a fixed price; that the property of the timber not actually received by plaintiffs in error, still remains in defendants in error, and at their risque as to the acts of God, or of strangers, and that defendants could recover for no more timber than was actually received by plaintiffs, or at most, for that which they could reasonably have taken possession of.

Contra. Swift: That as the promise, by the plaintiffs in error, was to pay for the sticks of timber that then lay in Missisque river, and to take them there; a delivery of the timber was not necessary, nor was it competent for the plaintiffs in

error to prove that the timber was taken by trespassers, after the contract was made.

By the Court. The purchase of the timber lying in Missisque river at different places, and the agreement to receive the timber as it lay in the river, was an executed contract, a sale which placed the property at the disposal and risque of the plaintiffs in error; the whole agreement taken together, and the situation of the property, did not require any other delivery to transfer the property, and the plaintiffs in error were liable, by the contract, to pay for all the sticks of timber which actually lay in the river, and they could have taken possession of at the time of making the contract.

As the sale was complete the subsequent acts of trespassers could not excuse the purchasers from the payment.

Judgment—There is no error, and Judgment of County Court affirmed.

SCIENTER—See Fraud.

SCIRE FACIAS.

TREASURER OF WINDHAM COUNTY *against* ERWIN.
Windham, 1817.

SCIRE Facias will not lie before the County Court upon a recognizance taken by a Justice of the Peace, for the appearance of the respondent from day to day, before said Justice. The action must be *debt*.

SECURITY—See Pledge.

SEIZURE—See Condemnation.

SERVICE.

HALE *against* M'LAUGHLIN. *Orange*, 1816.

A writ will not abate, served by a deputy sheriff, where the sheriff had been committed to Jail, was released from his confinement, had procured a certificate from a Judge of the County Court of his discharge, and the same recorded according to law, and had obtained the keys from the high bailiff; though the certificate had not been *delivered* to the high bailiff.

See Abatement 2, 9. Pauper Cases 6, 10. Poor Debtor 1.

SET-OFF.

No. 1.

HAYNES *against* WHITE. *Addison*, 1820.

IN an action on a negotiable note, endorsee against maker, endorsed and sued before the Statute of 1818, concerning pleading in off-set, the defendant cannot plead in off-set damages for breach of a covenant of warranty in a deed executed by the original payee.*

THIS was an action on a promissory note, given by defendant to one Philip Haynes, and by him endorsed to the plaintiff. The defendant originally pleaded a set-off of a demand against the said Philip for a breach of the covenant against incumbrances, in a deed of conveyance; to this plea the plaintiff demurred.

At the January term of the Court, 1818, judgment was rendered for the plaintiff, on the demurrer, on the ground that the defendant's claim was not the proper subject of a set-off, and the cause continued July term, 1818, for trial upon the general issue.

A verdict was returned for plaintiff, and the cause reviewed.

In November, 1818, the Legislature of this State passed an Act extending the right of set-off to all cases of contract. The defendant then pleaded *de novo*, a set-off of the same claim,

* The Act is, "That the 82d section of the Act to which this is an addition, shall be construed to extend to all actions and pleas founded on contract, whether the demand be for a sum liquidated or subject to estimation; and in nowise be construed to extend to actions or pleas founded on tort."

and added another count on a similar covenant executed by the said Philip.

The plaintiff demurred as before, and defendant joined in demurrer.

In support of the demurrer, *Phelps*, for plaintiff, insisted: That the demand of the defendant against Philip Haynes, is not properly pleaded in off-set; it was not at the time of the commencement of plaintiff's action, and of course was not at the time of the endorsement, a proper subject of set-off to the note.

1. Uncertain damages arising from a breach of covenant, are not pleadable in off-set, under the English Statute, which is similar to ours. Hawlet v. Strickland, Cowp. 506. Wingatt v. Wales, 6 T. R. 488. 2 Burr 1024.

It has been so decided in the United States' Courts. Winchester v. Hackley, 2 Cranch 344.

And in New-York. 2 Johnson 150.

And in this State. Rollins v. Walker, Chittenden Co. 1815; and in this case, January term, 1818.

2. It is insisted that the Act passed Nov. 11, 1818, does not affect the plaintiff's right of action, it having accrued before the law was enacted; for,

1. It is a general rule that all Statute laws act prospectively, and not retro-actively to divest a vested right. 1 Bla. Com. 45. 4 Burr 2462.

2. To give an Act that operation would render it as unjust as an expost facto law. Fletcher v. Peck, 6 Cranch 87.

3. It would render it a law impairing the obligation of contracts, invalidating a contract which was valid when made.

4. It is not a declaratory law, for a declaratory Statute is one which declares what the *common law* is, not one which regulates the construction of a former Statute. 1 Black. Com. 86.

5. The Legislature has not the power of construing laws. Bac. Abr. Tit. Statute H. Ogden v. Blackledge, 2 Cranch 272. Constitution of Vermont, section 6.

And it is an established rule that a Statute shall not be made, by construction, to operate retro-actively so as to affect a vested right.

Finally. A plea in off-set relates to the commencement of the action; if, therefore, the defendant's demand was not, at that time, proper to be pleaded in off-set, it is not now. Evans v. Prosper, 3 Term Rep. 186.

Contra. *Chipman* and *Seymour*, for defendants insisted: That by the 92d section of the Judiciary Act, passed March, 1797, he had a right to plead this matter in off-set; that this Statute is materially different from the English Statute of off-set; that the construction given to the English Statute of off-sett is not applicable to this Statute, and that such had been the decisions of the Supreme Court upon this Statute, for a course of years up to 1817, when a different construction was given to this Statute by the Supreme Court; that the Legislature, by an Act passed Nov. 11, 1818, have settled the construction of this Act, and determined that the construction given it for a course of years, by the Supreme Court, was the correct construction; and, that the matter contained in the defendant's plea, is proper matter to be pleaded in off-set, under the 92d section of the Judiciary Act. See Laws passsed October session, 1818, page 75.

This Act only affects the *remedy* and mode of adjusting the mutual claims, but does not affect the *right.*

All Statutes of set-off relate to prior contracts as well as those subsequent. The Statue making notes negotiable, affected notes executed prior, as well as those after the passing the Act; also, the Statute allowing certain notes to be plead in off-set, *only* after notice.

Opinion of the Court:

1. The Court will not depart from the decision of this question, made in 1818, supported by the previous decision, in the case of Rollins v. Walker.

2. The Court consider the case is different from a suit in favor of payee against the maker of the note; in such case the Statute of 1818, would not affect the *right* of the parties, but

only the *remedy*, and mode of adjusting the mutual claims; But, in the present case, before the passing of that Act, the plaintiff had acquired a vested right in the note; a contract existed that defendant should pay to the plaintiff the amount of the note, free from any claim against the original payee, of the nature set forth in the plea in off-set. The Statute cannot be construed to divest this right or affect this contract.

Judgment—That plea in off-set is insufficient.

No. 2.

HOLLINS *against* **WALKER.** *Chittenden*, 1815.

DAMAGES for not building a house according to contract, cannot be off-set, under the Statute. Money voluntarily paid upon a note, given in consideration of a contract to build a house which has not been performed, cannot be recovered back in an action for money had and received.

No. 3.

DYER *against* **BURDICT.** *Rutland*, 1817.

WHEN a declaration is filed on book, under the Statute of off-set, the amount of debt, reported by auditors, *only*, is to be plead in off-set, and all costs are taxed against the party in arrear.

See Execution 2.

SHERIFF—See Audita Querela 3. Bail Bond 3. Evidence 16, 18. Insanity. Pauper Cases 4. Service.

STATES OF THE UNION—Their acts how considered. See Bankruptcy 1. Executors and Administrators 1, 2, 5.

STATUTES, DECISIONS UPON.

No. 1.

SAVAGE *against* TULLAR. *Franklin*, 1816.

IN the 5th section of the Act more effectually to prevent trespasses, in divers cases, the word *wilfully* is not to be construed as synonimous with *voluntarily*, but implies a tort or wrong.

No. 2.

TRUSTEES OF ORANGE COUNTY GRAMMAR SCHOOL
against
DODGE. *Orange* 1817.

THE Act of 1813, appropriating the rents of grammar school lands, in Barre, to the county grammar school, at Montpelier, is not unconstitutional, but is consistent with the first provision in the Act of 1806, appropriating the same lands to Orange county grammar school.

Condemnation 1. Costs. Ejectment 4. Ex. and Ad. 13. Highways 1. Indictment 1, 2. Marriage. Pauper Cases 11. Pleas and Pleadings 7. Set-off 1.

SURVIVOR—See Insolvent Estate 1.

T.

TENANTS IN COMMON—See Division 1.

TENANTS AT WILL—See Trespass 2.

TENDER.

M'CONNEL *against* HALL. *Rutland*, 1820.

WHERE a note is payable in collateral articles at a time and place specified in the

note, proof that the promisser had, at the time and place specified in the note for the payment thereof, the property on hand, and that he had prepared the same for the payment of the note, is not sufficient evidence of the fulfilment of the contract.

THIS was an action on note, as follows :

"*Clarendon, Nov.* 5, 1816.

"For value received I promise to pay William M'Connel, one two horse waggon, to be well made and ironed, to be worth sixty dollars, by the 15th day of April next, to be delivered at my store.

"CALEB HALL."

Plea—Non assumpsit.

On the trial, at September term, 1819, the defendant offered to prove, that at the time and place mentioned in the note, for the payment thereof, the defendant had a waggon *ready* to be delivered to the plaintiff agreeable to the terms aforesaid.

Plaintiff objected, but the evidence was admitted by the Judge.

The defendant then gave testimony to prove that, at the time specified in the note, for the payment thereof, he had, at his store, in Clarendon, two waggons, one of which he had made for the purpose of paying said note.

The Judge charged the Jury, that if they found, from the evidence, that the defendant had the property, i. e. the waggon *ready*, on the day, and at the place mentioned in the note, for the delivery thereof, and of the description specified, it would amount to a fulfilment of the contract on his part, unless the plaintiff had shewn a subsequent demand, and an unreadiness on the part of the defendant, to deliver the same. And that it was unnecessary for the defendant to shew that he turned out the waggon at the place, and on the day mentioned in the note, and caused the same to be appraised to the plaintiff.

Verdict for defendant.

Motion for new trial, founded on exceptions to the opinion and charge of the Judge.

In support of the motion, plaintiff contended: That in all contracts for the payment or delivery of any specific or partic-

dlar articles, it is incumbent on the person who is to make the payment or delivery, to perform the contract by delivering the particular articles at the place mentioned, if any place be fixed for the payment; and, that a mere readiness is not in any sense, a fulfilment of the contract; that the articles or property must be so delivered as to become the property of the person to whom the payment is to be made; and, that having "the property ready on the day, and at the place mentioned in the note for the delivery thereof, and of the description specified," would not amount to a fulfilment on the part of the defendant, as the Jury were charged; but, would only prove an *ability* in the defendant to perform the contract, without proving an intention, or even an attempt to perform the same; that it is the duty of all persons, making contracts, to perform the same if in their power, and it is clearly in the power of persons making contracts of the kind on which this suit is brought, to perform them, by delivering the property at the place specified; no precedent act is required of the person to whom the payment is to be made, to enable the person contracting, to perform on his part. 5 Johnson 119. 8 Johnson 474. Co. Lit. 207, 210. 2 Swift 403–4. 10 East 101, Thomas v. Evans.

If the property is delivered according to the contract, or tendered, the contract is discharged, and the property belongs to the person to whom it is delivered, or tendered.

In contracts for the payment of money, an actual offer, or tender of the money, must be made, and a mere readiness is not sufficient; in that case, the person making the tender must remain ready, at all times, to make the payment, and so plead, and bring the money into Court.

If the law is as stated in the charge, this plaintiff, and all others in like circumstances, will be wholly without remedy. The Judgment will be a bar to any other action on the *note*; the waggon having been neither tendered or delivered, the plaintiff can have no claim on *that*, but it still remains the property of the defendant.

Contra. For defendant: That in cases of contracts for the delivery of collateral articles, at a certain time and place specified, it is always competent for the party bound to deliver, to shew that he was *ready* at the time and place specified, to deliver, and that the opposite party was not present to receive. 1 Chitty 309. 1 Selwyn 127, 126.

In cases where it is necessary for the plaintiff to deliver collateral articles, at a time and place specified, in order to maintain his action, he may shew that he was ready, at the time and place, to deliver, and that the defendant was not present to receive, and shall recover in the action, for the non-performance on the part of the defendant, as clearly as though he had proven the articles delivered to the defendant, he being present, or that he had delivered them to the defendant, he being present, and refusing to receive them.

In this case the plaintiff had paid for the waggon, and defendant had become obligated to deliver it, at the time and place mentioned; the defendant may shew a performance, or a readiness to perform, on his part, to *prevent* a recovery, precisely in the same manner, and by the same evidence, as the plaintiff may *support* his action, in cases where performance on his part is required, or the analogy of the law must be done away. 4. Mass. Rep. 474, Robbins v. Lull. 1 Johnson 129.

Judgment of the Court. The agreement declared upon, in this case, varies, in many respects, from a note for the payment of money; such note can be discharged only by payment and receipt of the money by the person to whom the note is payable; but this agreement may be discharged by the delivery of the property according to the terms of the contract. The question, in this case, is, whether the evidence offered under the general issue, was sufficient to shew a discharge of the contract; the promissor must perform his contract, as far as is practicable; proving that he was *able* to perform, could be no evidence of his intention to fulfil; proving that he had made preparations to fulfil *previous* to the day, is no evidence of such intention to fulfil *on* the day. The promissor, after a fulfilment

of his contract, is not bound to keep the property always ready, as in case of a tender of money, he must therefore make such *designation* of the article, on the day, and at the place of payment, as will *transfer the property* to the promissee, and enable him to pursue the property itself. The charge of the Judge upon the evidence was incorrect in this, "that if they found from the evidence, that the defendant had the property, i. e. the waggon, *ready*, on the day, and at the place mentioned in the note for the delivery thereof, and of the description specified, it would amount to a fulfilment of the contract on his part."

The case stated by defendant's counsel, is not analagous. In case of a *mutual* contract for the delivery of property on one part, and payment for the same on the other, the plaintiff may, by shewing a readiness to deliver the property on his part, and refusal to receive and make payment on the other, recover special damages for the breach of the contract; but, could he sue for, and receive the *value* of the goods or articles of property, which he was ready to deliver, but which were never transferred to the defendant? Such a case would be analagous, (as in this case the defendant attempts to shew the payment,) but no such case has been shewn.

New trial granted.

Williams for plaintiff.

Langdon and *Page* for defendant.

No. 2.

JOHN WOOD *against* JOSEPH BEEMAN. *Franklin*, 1819.

WHERE a note is payable in collateral articles, on demand, and a demand is made, promissor must deliver the articles so as to place them at the disposal of promissee.

Where a note is payable in collateral articles, at a time and place fixed, promissor must, at the time and place fixed, designate the articles he offers in payment.

ACTION on note of the following tenor:

"*Fairfax, June* 25, 1815.

"For value received, I promise to pay John Wood, forty-five dollars, forty cents' worth of good, clear white pine lumber,

such as floor plank, clapboards, and other clear boards, delivered at some of the saw-mills, in Fairfax, when called on—also, eighteen thousand good short shingles, by the first of January next, and two thousand feet of good merchantable white pine boards, on demand, all of which are to be delivered at one of the following mills, viz: Daniel Wilkins', Wheat Beals', or my own.

"JOSEPH BEEMAN."

Plea—Non assumpsit.

On the trial the plaintiff proved, by a witness, that he (witness) went with plaintiff to Fairfax, with teams, after boards—they met defendant some distance from his house, going from home; plaintiff informed defendant he was going after boards, defendant said he could not go back, but requested them to call on his son, who was authorised to act for him, and who would attend to the business. Plaintiff and witness proceeded, and called on defendant's son; he went with them to the mill, where they found some stuff, but not such as plaintiff was willing to take; they went to Shepardson's mill, where they found some stuff that would answer plaintiff's purpose, but Shepardson refused to let it go unless plaintiff would be responsible, in case defendant would not pay, as defendant's son, who acted as his agent, appeared rather unwilling to do any act which should bind his father, the defendant, to the payment; that plaintiff did so become responsible, and he and witness took each a load of boards.

The Judge directed the Jury, that it was not sufficient for defendant to shew there was lumber enough at the mills, unless it was also shewn that it belonged to defendant, and ready for the plaintiff, when called for; and farther, as defendant had constituted his son his agent, he would be responsible for his conduct, and if, by extreme caution, the agent did not deliver the lumber agreeable to the contract, the defendant would be resposible.

The defendant insisted that the part of the contract payable in shingles was complied with, as there were shingles enough,

which might be had on the first day of January, in Fairfax, which amounted to a tender, and proved there were some shingles near the defendant's house, at that time, but not the quantity specified in the contract.

The Judge directed the Jury, that it was requisite for the defendant to prove that there were shingles enough, at that time, ready to be delivered to plaintiff, at some place convenient for plaintiff to receive them; and for defendant to shew a performance of the contract on his part, he must shew such acts done by him, as would vest the property in the plaintiff.

The defendant contended that plaintiff could not recover on the whole contract, but only so much as had become due in money.

The Judge decided, that as the whole contract was put in issue, by the pleadings, that the verdict would conclude the whole.

Verdict for plaintiff.

Defendant excepts, and moves for a new trial.

By the Court:

1. As to the lumber to be delivered on demand, it was the duty of the defendant, when called on, to designate the place at which he would deliver the lumber, and to deliver it to the plaintiff; it does not appear that lumber, to answer the note, was offered at defendant's mill; the offer at Shepardson's mill was no tender; it did not place any lumber, unconditionally, at the disposal of the plaintiff.

2. The defendant could not fulfil the contract relative to the shingles, without performing some act which would designate the particular shingles set apart for the satisfaction of the plaintiff's demand; merely having them on hand would not be sufficient.

New trial not granted.

TOWNS—See Witness. Joinder 2.

TOWN TREASURER.

HINDS *against* **STONE, TOWN TREASURER.** *Bennington*, 1816.

AN action cannot be sustained by a town treasurer, *as such*, on a note of hand, given to him as town treasurer.

See Evidence 5.

TRESPASS.

No. 1.

LEONARD *against* **JUDD.** *Addison*, 1816.

IN a lease of 999 years, of certain premises, with the privilege of taking "all the rocks and stones on my land," the lessee is not liable for digging to any extent for rocks, provided he does not wantonly, under a bare pretence, dig the land to the injury of the lessor.

No. 2.

BROWN *against* **BATES.** *Orange*, 1816.

TENANT at will, may maintain tresspass for breaking down the fence of his enclosure.

No. 3.

STEEL ET AL. *against* **FISK ET AL.** *Orange*, 1816.

IN an action for breaking and entering a store, and carrying away goods, the defendant pleaded he was inspector of the customs; and, *as such*, he seized the goods, and the same were condemned in the District Court.

2. As to the breaking and entering the store, he was inspector, &c. and obtained a warrant from a Justice of the Peace, to him directed, as inspector, describing the goods as follows, viz: "several bales of dry goods, calicoes, chintzes, &c. and

ether goods, wares, and merchandize ;" to which plaintiffs demurred.

Decided by the Court. That the inspector was a seizing officer ; that the warrant was well directed to him *as inspector ;* that the description in the warrant was sufficiently particular, and that the pleas in bar were sufficient.

No. 4.

RICE *against* HATHAWAY. *Franklin*, 1816.

IN an action of trespass, the premises are well described in the following words : "the close of the plaintiff, situate, lying and being in St. Albans."

TRIAL.

MINARD *against* MINARD. *Windham*, 1816.

APPEAL from Judge of Probate.

The sanity or insanity of the testator, as also fraud or circumvention, in proving a will, may be tried by issue to the Jury.

See New Trial.

TRUSTEE ACTION.

No. 1.

SAFFORD COTTON, WOOLEN, AND LINEN COMPANY
against
HULL, TRUSTEE OF PRESCOTT. *Bennington*, 1819.

THE Court will not protect the interest of an assignee of a note, not negotiable against an attaching creditor, in a trustee suit.

IN this case the trustee, in 1814, owed a debt, by note, to Prescott, for 42 tons of ochre. In December, 1815, the note was sold to Abel and Lord, and notice given to Hull. Afterwards, in June, 1816, this suit was brought ; the trustee disclosed that about $150 remained due on the note, and that Abel

and Lord did inform him that they held the note, but not that they were the owners of the note, before the service of the writ, in this suit: Abel and Lord now move to be admitted to appear in this suit, and protect their equitable interest in the note, and to prove that they had given notice to Hull, that they were the owners of the note, and that they had paid Prescott a valuable consideration, in full, for the note. Evidence was heard, subject to the opinion of the Court, upon the whole case; the purchase and notice was proved.

The Court decided. That they would not protect the interest of an assignee of a note, not negotiable, against an attaching creditor, in a trustee suit, and rendered

Judgment—That the trustee is liable in this action.

No. 2.

STRONG *against* ALLEN, TRUSTEE OF STRONG. *Rutland*, 1818.

THE principal debtor cannot plead "that he was not a concealed or absconding debtor," in *bar*.

THIS was an action brought in pursuance of the Act entitled "An Act directing the proceedings against trustees of concealed or absconding debtors."

Strong, the principal debtor, pleaded *in bar*—That at the commencement of the present suit, he was not a concealed or absconding debtor. Demurrer.

In support of the demurrer, *Williams* and *N. Chipman* argued:

1. That the trustee action is a remedy provided for the creditor, extending the right of attachment to property in *action*, as well as that in *possession*. 1 Stat. p. 241. et Seq.

2. The Statute is a remedial one, and should be liberally and beneficially expounded.

3. The trustee alone, is interested in the question, whether the property be regularly and legally attached, and this question can be raised by the trustee *only*, for this action is to pro-

ceed against the principal debtor, whether the trustee be charged or not. 1 Stat. p. 243, sec. 4, and p. 244, sec. 5, proviso.

4. At any rate, the principal debtor cannot plead this plea in *bar*, it must be pleaded in *abatement*, if at all; this proceeding is analagous to the British foreign attachment; the action is founded partly on the Statute and partly on the general act, the *main action* is the declaration against the principal debtor; the process against the trustee is merely the *mode* of attaching the property; a plea to the *action* is not whether the right action is brought, but to the cause of action, as connected with the plaintiff. Whether the defendant is exempt from arrest, or whether property, not liable to be attached, is attached, cannot be pleaded in abatement, or bar, but the defendant may be discharged, or the attachment dissolved. Suppose the trustee discharge himself, why does not this abate the suit? Because it does not affect the suit between the principal parties.

Contra. *Clark* and *Mallary*:

Any fact which shews the plaintiff's *action*, could not be sustained, at the time it was commenced, may be pleaded in *bar*.

Action is of the same import as SUIT, or *proceedings in a cause*; any defence which shews that the contingency which the law requires, to give the action, has not happened, may be pleaded in *bar*.

This action is unknown at common law, and is entirely a creature of the Statute; it can be maintained *only* in case the debtor has absconded; if the plaintiff commences his suit before this event, the principal debtor may plead this plea in *bar*, as it wholly defeats the action.

By the Court. The *principal debtor* cannot plead this plea, either in *bar* or *abatement*, but can take advantage of the fact set up in the plea, only by motion to dismiss the process, as against the the *trustee*, in the nature of a motion to dissolve an attachment.

Judgment—That plea in bar is insufficient.

No. 3.

GAFFIELD *against* ENOS ET AL. TRUSTEES OF PARKER.
Caledonia, 1819.

Plea—In *abatement*, by Parker—That he was not a concealed or absconding debtor.

Judgment—That the plea is insufficient, and that defendant answer over in a better plea.

No. 4.

HUTCHINSON *against* LAMB AND TRACY, TRUSTEES.
Windsor, 1819.

A person claiming damages, for a conversion of his property, is not a *creditor* within the meaning of the Statute.

THE plaintiff, in this case, declared against the principal debtor, in an action of *trover*.

The trustees moved to dismiss the suit, on the ground that the plaintiff was not a creditor within the meaning of the Statute.

In support of the motion, *Marsh* contended:

That the parties do not stand in the relation of *creditor* and *debtor*; those terms imply an existing *debt*, and not a mere claim for *damages*, either for not fulfilling a special contract, or for a tort or trespass; the absconding debtor could not plead in off-set, to such a declaration against him, and thus the trustee could not defend for him, and *creditors* would be injured. When the Legislature used the words *creditor* and *debtor*, it must be presumed they knew their meaning, and intended to exclude actions of this kind, which are so uncertain in their nature.

Contra. Plaintiff contended:

That the word *creditor* is not confined merely to the payne of a contract, but as used in this Statute, means any person who has, against another, a just and legal claim to receive damages in a civil suit. This is a remedial Statute: the *mischief*, under the old law, was, that where the body was concealed, or

absconded, and the property in the hands of trustees, a person having a just and legal claim for damages, in an action of assumpsit, trover, or trespass, had no means of obtaining satisfaction; the *remedy* is by securing the property, placed in the hands of the trustees, by this action.

Without this construction of the word *creditor*, the remedy is too narrow for the mischief; a man, whose property is forcibly taken away, or tortiously converted, and the wrong-doer absconds, is as much entitled to remedy as if he had sold the property, and the purchaser had absconded, and even more. This construction can work no injury, either to the principal debtor, or to the trustee; *their* rights and safety are preserved.

It was never doubted, but that a man, having a claim against the estate of a person deceased, for forcibly carrying away his property, might enforce that claim before commissioners; yet, the word *creditor* is the only word in that Statute, under which he can name himself, with regard to such claim.

The Court decided: That the plaintiff's case did not come within the meaning and purview of the Statute, "directing the proceedings against the trustees of concealed or absconding debtors."

Judgment—That the suit be dismissed with costs.

U.

USE AND OCCUPATION—See Book 2.

USURY.

COLLINS, *qui tam, against* ROBERTS. *Bennington*, 1817.

THE taking up of one security and giving another, is not such an extinguishment of the first contract, as the Statute of limitations will attach, and prevent a recovery for usury where the declaration is founded on the *first contract*, and the usurious

money is proved to have been paid upon the *last security*; the whole is considered as one entire contract.

See Jurisdiction 5.

V.

VARIANCE—See Ejectment 5. Evidence 7.

VENDUE SALE.

VERMONT STATE BANK *against* CLARK. *Rutland*, 1817.

LANDS taken on execution, in favor of the President and Directors of the Vermont State Bank, may be *sold* on the execution, by the officer; the execution in this case, need not be recorded in the town clerk's office.

VERDICT—See Evidence 13. New Trial 5, 6, 7, 8, 13. Ejectment 6.

VOLUNTARY PAYMENT—See Set-off 2.

W.

WARNING—See Pauper Cases 5, 6, 7, 8, 10.

WARRANT.

ADMINISTRATOR OF FELLOWS *against* TUTTLE ET AL.
Franklin, 1815.

UNDER the Statute, passed October, 1789, directing the treasurer to issue his warrant, against the proprietors of certain towns, to defray the expence of surveying; it was neces-

sary that he should, in his warrant, name the persons, and the several sums by them to be paid.

See Trespass 3.

WARRANTY.

No. 1.

ADAMS & CO. *against* **SIMPLE.** *Addison*, 1816.

DEFENDANT sold to the plaintiff, fifty-five barrels of pork, and in the account of sales are these words: "The said Simple to be accountable for the quality and weight of the pork *only*." It was decided that he was accountable in case the pork was not salted according to the usual custom.

No. 2.

MEEKER *against* **DENISON.** *Addison*, 1820.

WHERE A. sold to B. a note, payable in cloth, and warranted the same *collectable*; after the note fell due B. issued a writ of attachment, obtained a judgment, and issued an execution against the maker of the note, which is returned non est. B. sues A. on the warranty. A. offers to prove that B. sold the note to C. before it fell due; that when the suit was commenced on the note, the maker had sufficient personal property, which A. offered to turn out on the attachment, but which C. refused to take. This was held proper evidence to discharge A. from his warranty.

ERROR brought to reverse the judgment of Addison County Court.

In the original suit, Denison v. Meeker, the declaration stated that Meeker sold Denison a note, payable in cloth, in favor of one Asa Staples, against Refine Weeks, and warranted the same to be *collectable*; it also stated, that when said note became due, a writ of attachment was issued on it, and being duly served and returned, was entered in Court, &c. Judgment recovered for the plaintiff, and execution taken out, and returned, with the officer's return thereon endorsed, that he could find neither the goods, chattels, or estate of said Weeks, whereon to levy, &c. and had commited his body to Jail, &c.

Plea—Non assumpsit.

On the trial, in the County Court, the defendant offered to prove that Denison, before the suit was commenced, sold the note to one Barton, who commenced and controlled the suit; that at the time when the suit was commenced, Weeks had more than sufficient personal property to satisfy the debt, which might have been attached, and which Meeker offered to *turn out*, and requested Barton to take, but which Barton refused to do. This evidence was rejected, and this writ of error is founded on a bill of exceptions to the decision of the County Court.

Upon the above facts, the plaintiff in error, contended:

That the rejection of such testimony was erroneous, because the testimony proved the fact *warranted*, to wit, that the note was *collectable*.

By the Court. The evidence ought to have been admitted; the facts offered to be proved, shewed a *gross* neglect on the part of Barton, inasmuch as he refused to permit Meeker to secure the debt against Weeks.

Judgment—That there is error; Judgment of the County Court reversed, and the cause continued to the Jury term for trial.

WIDOW.

FLOWERS, EXECUTOR, *against* KENT. *Bennington*, 1817.

IN case there was a parol agreement, between husband and wife, before marriage, that the personal property of the woman should remain to her sole and separate use, although the property should come into the possession of the husband, during coverture, and be again put out, and the security taken in the name of the wife; on the death of the husband, the property belongs to the wife.

WITNESS.

CHESTER *against* ROCKINGHAM. *Windham*, 1818.

IN a question between two towns, which shall support a pauper, an inhabitant of the town cannot testify, if he is rated and taxed in the town.

See Pauper Cases 11.

WILL.

ELISHA PARKHILL, EXECUTOR OF JAMES PARKHILL,
against
JESSE PARKHILL ET AL. *Rutland*, 1819.

APPEAL from the Judge of Probate.

In this case, it appeared, that after the publication of the will, in question, the testator had deeded all his real estate; and the question was, whether such conveyance operated as an implied revocation of the will, *in toto*.

For the defendants, *Mallary* contended:

1. That the execution of the deed was inconsistent with the will, and therefore the *law* declares such act to be a complete revocation of the will. Bac. Ab. vol.7, p. 334, 366. 7 T. R. 412. 1 Bos. and Pul. 576. 3 Com. Dig. 396, 400. 2 Atk. 273.

2. Parol evidence is inadmissible to prove, that the testator did not intend to revoke the will; for, as the execution of the deed was a *legal* revocation—the intention of the testator not to have it considered a revocation, is of no avail, in opposition to the rule of law. Peake's Ev. 437. 7 T. R. 409. 6 Jac. L. D. 402. 2 Atk. 579. 3 Atk. 804. 1 Bos. and Pull. 576.

3. The legacies are dependent on the dispositon of the real estate, and *that* being disposed of by deed, there is nothing left to give effect to the will. 3 Com. 400.

For the executor, *Langdon* and *Williams* contended:

That the testator's giving a deed of all his real estate, or converting it into personal property, is not a revocation of the will, except *pro tanto*, and cannot affect it as to personal property. 3 Wilson 512. 6 Jac. L. D. 448. 7 Bac. Ab. 344–5–6–7–8.

The Court decided: That the alteration or disposition of the real estate, subsequent to making and publishing a will, is not, in this State, an implied revocation of such will *in toto*.

Ere. J. G.

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